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Roger C. Cramton
Cornell Law School, rcc10@cornell.edu

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The Supreme Court and State Power to Deal with Subversion and Loyalty†

In this Article, Professor Cramton discusses the effect of recent United States Supreme Court decisions on state control of Subversive activities. He finds that while the decisions to some extent restrict state activity in this area, and though the Court in its decisions gives the impression of vacillation and confusion, some definite an dworkable principles are emerging which contribute to a resolution of the inherent conflict of federal-state relations which these issues pose. He concludes that as the states grow more sophisticated in their treatment of these issues, so the policy of judicial self-restraint will become more influential in restricting Supreme Court examination of state policy and activities toward these questions.

Roger C. Cramton*

SINCE the end of World War II, issues of subversion and loyalty have been more important in the work of the Supreme Court than at any other time in American history. It was inevitable that the national preoccupation with the loyalty of citizens as well as noncitizens ultimately would be reflected in constitutional controversies before the Court. Perhaps it was also inevitable that decision of these matters would itself involve the Court in another of those intermittent crises which have marked constitutional development in the United States.

The intensity of this latest crisis is partially explained by the novelty and complexity of the constitutional questions presented for decision. It was only natural that a nation confident of its external security and preoccupied with its own expansion and de-

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* Assistant Professor of Law, University of Chicago Law School.

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velopment would remain unconcerned with the loyalty of its citizens.[1] The discovery, after World War II, that our comfortable isolation from the perils of physical assault had come to an end came as a great shock. The sudden realization of vulnerability, coupled with fear of this unknown experience, produced a rash of defensive measures for which earlier experience provided little counterpart. The coercive impact of many of these measures clashed with our traditions of individual liberty and free dissent without finding support in an indigenous American theory of an organic, personalized State. The absence of a body of constitutional principles clearly applying to these novel circumstances increased the difficulties of the Court and insured criticism whatever action it took.[2]

Other factors, however, contributed to the current controversy. Although the existence of a communist threat to our national security was widely recognized, there was no substantial unanimity of public opinion concerning the magnitude of the threat or the action required to meet it. Since existing constitutional doctrine required a balancing of the "rights" of individuals and the governmental interest in security, conflicting evaluations of the communist menace were relevant to the Court's task.[3] Nevertheless, expression in decisions of the Court's views of the seriousness of the situation irritated those who, at any time, assessed the problem differently.[4] Finally, concern with the Court's decisions with respect to subversion has been reinforced by other controversies in which the Court is involved. The creative expansion of fourteenth amendment rights by the Warren Court,[5] the uproar over

1. The relative scarcity of treason prosecutions illustrates the point. Despite the fact that the United States had been involved in many wars, Professor Hurst could still say in 1945: "There have been less than two score treason prosecutions pressed to trial by the Federal government; there has been no execution on a federal treason conviction; and the Executive has commonly intervened to pardon, or at least mitigate the sentence of those convicted." Hurst, *Treason in the United States*, 58 HARV. L. REV. 806 (1945).

2. This argument is spelled out in SWISHER, THE SUPREME COURT IN THE MODERN ROLE 66–70, 101–03 (1958).

3. The clear and present danger test, for example, requires an explicit evaluation of the substantiality of the threatened harm. See discussion of the doctrine in the various opinions filed in Dennis v. United States, 341 U.S. 494 (1951).

4. Nor was the Court necessarily consistent in its evaluation or in agreement within the Court. *Compare* Konigsberg v. State Bar, 353 U.S. 252, 267–68 (1957) (majority opinion of Black, J.), *and* Schneiderman v. United States, 320 U.S. 118, 131–59 (1943) (opinion of Murphy, J.), *with* Dennis v. United States, 341 U.S. 494 (1951) (opinion of Vinson, C.J.), *and* American Communications Ass'n v. Douds, 339 U.S. 382, 422–33 (1950) (separate opinion of Jackson, J.). The various opinions in each of these cases, with the exception of *Konigsberg*, reveal a difference of opinion among members of the Court.

5. The increased concern with state criminal procedures is excellently summarized in Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*,

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the School Segregation Cases,[6] and the continuing discussion as to whether the Supreme Court has not unduly enlarged federal power at the expense of the states[7] have been the major focal points.

In recent months criticism of the Court's performance in deciding issues relating to subversion and loyalty has come from two responsible sources. In August 1958 the Conference of Chief Justices admonished the Supreme Court to exercise judicial restraint and approved a report of its Committee on Federal-State Relationships as Affected by Judicial Decisions.[8] Nearly one-fourth of the thirty-one page report was devoted to a critical examination of Supreme Court decisions restricting state power to deal with issues of subversion and loyalty. In February 1959 the House of Delegates of the American Bar Association approved resolutions which called for congressional reversal of a half-dozen Supreme Court decisions involving subversion.[9] Although the resolutions opposed any attempt to limit the jurisdiction of the Court and avoided direct criticism of the Court, they stated that the decisions "have been severely criticized and deemed unsound by many responsible authorities" and that legislative reversal was needed "so as to remove any doubt as to the intent of the Congress, and to remedy any defect in the existing law revealed by the decisions."[10] The implication of the resolutions, which was made explicit in the committee report which accompanied them, was that the Court had misinterpreted the Constitution, misread the intent of Congress, and given aid to the communist movement.[11]

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8 U. CHI. L. SCH. REC. 3 (Spec. Supp. 1958). See also Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

6. See Fairman, *The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956); Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 434–43 (1957).

7. KILPATRICK, THE SOVEREIGN STATES (1957); see SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789–1957 (1958).

8. CONFERENCE OF CHIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS (Chicago 1958). The report is reprinted in U. S. News & World Report, Aug. 29, 1958, p. 62. It is also available from the Conference of Chief Justices, 1313 E. 60th St., Chicago 37, Illinois, $1.00.

9. AMERICAN BAR ASSOCIATION, RESOLUTIONS OF THE SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY AND OBJECTIVES (1959). The text of the resolutions and a portion of the debate which preceded their approval are reprinted in 45 A.B.A.J. 360, 365, 400, 406–10 (1959). The decisions that would be reversed include Yates v. United States, 354 U.S. 298 (1957); Watkins v. United States, 354 U.S. 178 (1957); United States v. Witkovich, 353 U.S. 194 (1957); Cole v. Young, 351 U.S. 536 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

10. 45 A.B.A.J. 360, 408 (1959).

11. See AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON COMMUNIST TACTIC, STRATEGY AND OBJECTIVES (1959). The President of the Association has pointed out that the adoption of the resolutions did not constitute an endorsement of the Report of the Special Committee and has argued, somewhat apologetically, that the resolutions do not criticize the Supreme Court. Malone, *The Communist Resolutions: What the House of Delegates Really Did*, 45 A.B.A.J.

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This Article will consider, in the light of the current controversy surrounding the Supreme Court, the development in recent years of constitutional limitations on state power to deal with issues of subversion and loyalty. The more numerous decisions involving federal legislation dealing with communist subversion will be discussed only where necessary to illuminate problems arising with respect to similar state legislation. Attention is centered on the decisions involving state power for reasons largely of convenience in exposition and summary. Nevertheless, there are several reasons for examining separately these cases. First, the story of the Court's review of federal action in this field has been retold many times.[12] Second, although the Court has talked a great deal about first amendment and fifth amendment limitations on federal power, the cases, with several exceptions, either affirm federal power or resolve particular issues adversely to the federal government as a matter of statutory construction, or on relatively narrow procedural grounds.[13]

343 (1959). The debate in the House of Delegates, however, reveals that many of the delegates, including both supporters and opponents of the resolutions, thought that the resolutions were directed at the Supreme Court. For example, Loyd Wright, a past President of the Association and a supporter of the resolutions, stated: "Isn't it time we stood up and told the American people that we will not stand for subversion? Isn't it time that we ask the Court to read the law and interpret the law and quit writing ideological opinions? . . . " 45 A.B.A.J. 360, 406 (1959).

12. Full citation to the tremendous literature on the subject may be found in 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 315–16, 333–38, 371, 390, 413–14, 425–28, 447, 520–21, 528, 535, 553–55 (2d ed. 1958).

13. The major decisions in which federal power has been upheld against constitutional attack include Galvan v. Press, 347 U.S. 522 (1954) (upholding deportation of alien for past membership in the Communist Party); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding deportation of aliens for past beliefs or actions); Dennis v. United States, 341 U.S. 494 (1951) (upholding a prosecution under the Smith Act); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (upholding Taft-Hartley requirement of oath of union officials as a condition of union's obtaining rights under the Act); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (upholding plenary power to exclude aliens).

Among the numerous decisions construing federal statutes adversely to the Government are: Greene v. McElroy, 79 S. Ct. 1400 (1959) (federal government's industrial security program for government contractors not specifically authorized by Congress); Kent v. Dulles, 357 U.S. 116 (1958) (Secretary of State does not have statutory authority to deny passports to Communists); Bonetti v. Rogers, 356 U.S. 691 (1958) (Immigration and Nationality Act does not provide for deportation of an alien who has not been a member of the Communist Party since his *last* entry); Yates v. United States, 354 U.S. 298 (1957) (Smith Act does not prohibit the teaching and advocacy of the violent overthrow of the United States Government as an abstract doctrine); United States v. Witkovich, 353 U.S. 194 (1957) (power of Attorney General to ask questions of alien against whom a deportation order has been outstanding for more than six months limited to questions related to availability for departure); Cole v. Young, 351 U.S. 536 (1956) (summary suspension of federal employees authorized only for employees in "sensitive" positions).

Some of the major cases turning on procedural points are: Vitarelli v. Seaton, 359 U.S. 535 (1959) (discharge of federal employee on security grounds invalid because

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Finally, the cases reviewing state power in this field reveal most clearly the continuing struggle of libertarian ideals with federalist principles. At times libertarian victories have produced novel and creative constitutional doctrine. But a resurgence of federalist concepts, combined with less spacious views of the proper scope of judicial review, has in most instances revived state power and cast doubt on the precedent value of the earlier decisions upholding individual freedom against state action.

If the states had been content to leave matters of communist subversion to the federal government, the constitutional problems of subversion and loyalty in the states would never have arisen. For better or for worse, the political and legislative issues were settled at an early date in favor of state participation. A number of state legislatures embarked on ambitious programs of legislative investigation in order to discover and expose disloyal or subversive persons and organizations;[14] and a steady stream of legislation dealing with every phase of "subversion" has poured from state capitols.[15]

It is arguable that, given the extensive federal legislation and

of failure to comply with departmental regulations); Flaxer v. United States, 358 U.S. 147 (1958) (reversal of conviction for contempt of Congress on ground that witness was given ten days from date named in indictment within which to comply); Yates v. United States, 355 U.S. 66 (1957) (reversal for duplication of concurrent convictions for contempt of court); Jencks v. United States, 353 U.S. 657 (1957) (reversal of conviction for filing a false noncommunist affidavit because of denial of defendant's motion for production of reports made to the FBI by government witnesses who testified at the trial); Gold v. United States, 352 U.S. 985 (1957) (per curiam) (reversal of conviction for filing a false noncommunist affidavit because of FBI contact with jury during course of trial); Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956) (reversal of registration proceeding because of allegations of perjury).

14. The operation of state legislative investigating committees is described in BARRETT, THE TENNEY COMMITTEE: LEGISLATIVE INVESTIGATION OF SUBVERSIVE ACTIVITIES IN CALIFORNIA (1951); CHAMBERLAIN, LOYALTY AND LEGISLATIVE ACTION: A SURVEY OF ACTIVITY BY THE NEW YORK STATE LEGISLATURE, *1919–1949* (1951); COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON (1951); GELLHORN, THE STATES AND SUBVERSION (1952).

15. The state legislation as of 1955 is described in plentiful detail in FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 241–488 (1955) (hereinafter cited as DIGEST). Existing laws prohibiting treason, insurrection, sabotage, sedition and the like have been refurbished and expanded. Communists and subversives have been excluded from public office and denied the right to vote. Loyalty oaths have been widely required not only of elected officials and public employees, but of other groups as well, particularly lawyers and teachers. Comprehensive registration statutes have required organizations or persons defined as "subversive" to register with state authorities. Disabilities have been imposed on those who register, while a failure to register subjects the alleged "subversive" to criminal penalties. In some states the Communist Party has been made an unlawful organization; nearly everywhere substantial disabilities have been imposed on communists. Among the various privileges and benefits which have been denied to "subversives" are jury service, public housing, tax exemption and welfare benefits. And, finally, many municipalities have thought it necessary to duplicate the federal and state legislation with local ordinances covering the same ground.

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enforcement, much of this state legislation was unwise and that the need for action on the part of the states would have been satisfied by full co-operation with the federal authorities. Certainly most of the state legislation has proved ineffective. A mere handful of admitted communists have been prosecuted in state courts for sedition or similar crimes.[16] The Communist Party has been deprived of the somewhat dubious opportunity of capturing the vote of the common man. The state registration schemes have been entirely inoperative. Throughout the entire country only one individual is reported to have registered, and despite the lack of registrants, no prosecutions for failure to register have been brought.[17] Only the loyalty oath requirements have proved to be of much consequence. Under their authority, a substantial number of persons, including some communists, have been removed from public employment (including such sensitive positions as subway conducting!) and from professions such as teaching and law. Here again, it is arguable that this has been accomplished only at a disproportionate cost in terms of a climate of public opinion unfavorable to the free expression of political views.[18] But these are matters for legislative judgment; this Article is concerned primarily with the judicial and constitutional issues relating to state power over matters of subversion.

At the outset the distribution between the states and the federal government of power to deal with matters of subversion and loyalty will be briefly canvassed. The salient event here is the displacement of state authority by *Pennsylvania v. Nelson*,[19] and the scope and effect of that decision will be considered in Part I. In Part II the developing constitutional limitations on legislative investigation of subversive activity will be summarized. Part III will be concerned with the evolution of novel procedural and substantive limitations on state power to impose civil disqualifications for subversive thoughts or conduct. Although the law remains in a state of evolving uncertainty, an attempt will be made in Part IV to summarize the emerging constitutional principles and to evaluate the Supreme Court's performance.

I. Displacement of State Authority—The *Nelson* Case

An essential feature of American federalism is that the states continued, under the Constitution, to exercise general governmental

16. Brief for the United States as Amicus Curiae, p. 30 n.19, Pennsylvania v. Nelson, 350 U.S. 497 (1956).

17. Digest, *op. cit. supra* note 15, at 384.

18. See Brown, Loyalty and Security 164–202 (1958), in which the social and legal implications of widespread use of loyalty tests for public and private employment are thoroughly discussed.

19. 350 U.S. 497 (1956).

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competence except to the extent that the Constitution or federal statutes deprived them of competence or displaced state law. Federal law, which emanates from the Constitution and from Congress, is built on and presupposes the existence of state law; it is the exception rather than the rule; and generally, even where federal power to act is clear, the displacement of state law is thought to require some special justification.[20] Thus in the absence of an express constitutional provision making the regulation of subversion an exclusive national function, the states have concurrent legislative power.[21]

In *Pennsylvania v. Nelson*, the Supreme Court reaffirmed its earlier holding that the states have concurrent power with the federal government to prescribe criminal penalties for sedition directed against the United States.[22] The significance of the case, however, does not lie in what the Court said the states might do, under other circumstances, but in what the Court said they might *not* do under existing circumstances. For the Court, drawing on the metaphorical tests for "occupation of the field" developed in commerce clause cases, held that federal legislation regulating communist activity had superseded to an uncertain extent the sedition statutes of the states. The Court effected this broad displacement of state sedition laws without seriously considering the applicability of its comerce clause "tests of supersession" to a case involving overlapping criminal statutes and a congressional saving clause.

I have elsewhere suggested that the Court's "tests of supersession" are so vague that judicial views of the desirability of the particular state legislation under attack appear to control the outcome; that the Court should consider whether its vague tests should be extended to cases not involving the commerce power; and that the Court misapplied its pre-emption doctrine in *Pennsylvania v. Nelson*.[23] For present purposes, however, I will assume that the Court's pre-emption doctrine was properly applied in *Nelson*. The

20. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

21. Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Gilbert v. Minnesota, 254 U.S. 325 (1920). This conclusion is not self-evident. Some of the federal war powers are exclusive federal responsibilities. U.S. CONST. art. I, § 8, cls. 11–16, § 10, cl. 3. And although the states retain the power of self-preservation to suppress insurrection and repel invasion, the duty of preserving the state governments rests upon the federal government. Mr. Justice Brandeis argued unsuccessfully in his dissenting opinion in *Gilbert*, 254 U.S. at 334–43, that penalties for interference with federal recruitment were within the exclusive power of the federal government. *Cf.* People v. Lynch, 11 Johns. 549 (N.Y. 1814), and *Ex parte* Quarrier, 2 W. Va. 569 (1866), in which state treason prosecutions were dismissed.

22. 350 U.S. 497 (1956).

23. Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Pre-emption*, 26 U. CHI. L. REV. 85 (1958).

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concern here is with the effect of the *Nelson* case and subsequent decisions on state power to punish and otherwise control subversive activity.

The *Nelson* case holds that the states cannot punish sedition directed against the United States Government, but declares that they remain free to punish offenses involving a local breach of the peace. Except at these extremes, the scope and effect of the decision remain unclear. However, it is possible to speculate about the probable effect of the decision on state criminal prosecutions for other overlapping offenses, on state communist control measures, on state loyalty-oath programs, and on state legislative investigations.

It seems probable that the *Nelson* case will be interpreted as prohibiting any state sedition prosecution in which the evidence also establishes an attempt to overthrow the federal government. Several state courts have already so held.[24] Although the seditious conduct in the *Nelson* case was said to be directed solely against the federal government, the reasoning of the Court is equally applicable to any case in which communist sedition is involved. The Smith Act prohibits attempts to overthrow state or local governments as well as the federal government.[25] The nature of the communist movement, when considered in connection with the congressional declaration that the Communist Party is engaged in a world-wide conspiracy to overthrow established government,[26] makes it unlikely that any case involving communist sedition would not present an attack against federal as well as against state authority. State activity in this area would appear to require evidence of an actual or threatened local breach of the peace. If, for example, a seditious speech resulted in a serious public disturbance, the state could impose punishment, since the *Nelson* case does not "limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds."[27] And the decisive issue should be whether there is evidence of a threat to a distinctive local interest, such as maintenance of public order, and not the label affixed to the indictment.

24. Commonwealth v. Gilbert, 334 Mass. 71, 134 N.E.2d 13 (1956) (dismissal of prosecution under state criminal anarchy statute); Commonwealth v. Hood, 334 Mass. 76, 134 N.E.2d 12 (1956) (dismissal of prosecutions under state subversive activities statute, charging membership in the Communist Party and contributions to it); Braden v. Commonwealth, 291 S.W.2d 843 (Ky. Ct. App. 1956) (reversal of conviction under state sedition act for conspiring to damage property to incite social troubles; local breach of the peace clearly involved); State v. Jenkins, Crim. Dist. Ct., New Orleans, La. (unreported decision dismissing a prosecution under the Louisiana Subversive Activities Law for membership in a "subversive organization"). See 3 CIV. LIB. DOCKET 27 (1958).

25. 18 U.S.C. § 2385 (1952).

26. 70 Stat. 899 (1956), 50 U.S.C. § 851 (Supp. IV 1957).

27. 350 U.S. at 500.

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Outside the sedition area, the *Nelson* decision will not prevent all state prosecutions for an offense also punishable under federal law, but it will require that some distinctive local interest be involved. Both state and federal governments can continue to punish such overlapping offenses as bank robbery,[28] assault on a federal officer,[29] theft from a post office[30] and the like, [31] since in each case the criminal conduct inevitably involves a local breach of the peace.

It is probable, however, that state power to punish other overlapping offenses, such as interference with federal recruitment,[32] desecration of the United States flag,[33] impersonation of a federal officer and the like, is no longer permissible absent a showing that a local breach of the peace is involved. In each of the above instances the sole purpose of state initiative is to aid the federal government in maintaining respect for federal institutions. Although there is no logical reason why the police power of a state should not encompass the furthering of national purposes and unity, these matters are of distinctive federal interest, and the existence of a federal penalty may be thought to require a finding of pre-emption.

A number of states have comprehensive communist control meas-

28. See Jerome v. United States, 318 U.S. 101 (1943); *In re* Morgan, 80 F. Supp. 810 (N.D. Iowa 1948); People v. Candelaria, 139 Cal. App. 2d 432, 294 P. 2d 120 (1956); State v. Cioffe, 130 N.J.L. 160, 32 A.2d 79 (Sup. Ct. 1942). See also Bartkus v. Illinois, 359 U.S. 121 (1959) (no pre-emption question suggested as barring state prosecution for bank robbery after an acquittal in a federal trial for same acts).

29. See Brooke v. State, 155 Ala. 78, 46 So. 491 (1908) (assault and battery in post office).

30. Quinn v. State, 39 Ala. App. 107, 95 So. 2d 273 (1957). Cases preceding the *Nelson* decision include United States v. Amy, 24 Fed. Cas. 792 (No. 14,445) (C.C. Va. 1859) (dictum) (Taney, C.J.); State v. Moore, 143 Iowa 240, 241–42, 121 N.W. 1052, 1053 (1909); Commonwealth v. Ponzi, 256 Mass. 159, 152 N.E. 307 (1926); *In re* Van Dyke, 276 Mich. 32, 267 N.W. 778 (1936); People v. Burke, 161 Mich. 397, 126 N.W. 446 (1910); *Ex parte* Groom, 87 Mont. 377, 381–82, 287 Pac. 638, 639 (1930); State v. Stevens, 60 Mont. 390, 199 Pac. 256 (1921); Hayner v. State, 83 Ohio St. 178, 93 N.E. 900 (1910); State v. Morrow, 40 S.C. 221, 18 S.E. 853 (1893); State v. Ferree, 88 W. Va. 434, 437, 107 S.E. 126, 127 (1921).

31. Pre-emption arguments based on the *Nelson* case have been rejected in the following cases: Guerin v. State, 315 P.2d 965 (Nev. 1957) (narcotics); People v. Knapp, 157 N.Y.S.2d 820 (Ct. Gen. Sess. 1956) (labor extortion); People v. Bianchi, 3 Misc. 2d 696, 155 N.Y.S. 2d 703 (Nassau County Ct. 1956) (excessive motorboat speed).

32. Although Gilbert v. Minnesota, 254 U.S. 325 (1920), would appear to be directly in point, it was distinguished in *Nelson* on the ground that Gilbert's remarks at a public meeting created a threat of disorder constituting a local breach of the peace. The implication is that a state can no longer prosecute for interference with federal recruitment absent facts giving rise to a local breach of the peace.

33. In People v. Von Rosen, 13 Ill. 2d 68, 147 N.E.2d 327 (1958), the Illinois Supreme Court reversed a conviction under a state statute prohibiting desecration of the United States flag because it was not shown that the conduct was likely to produce a breach of the peace within the state. The basis for the holding was that "Congress has left no room for the States to punish desecration *qua desecration*. . . . " *Id.* at 71, 147 N.E.2d at 329.

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ures resembling the federal Subversive Activities Control Act of 1950 and Communist Control Act of 1954.[34] These statutes provide for registration of communist and subversive organizations, set out penalties for sabotage, and impose various disabilities upon registrants, such as exclusion from the ballot and from public office. Other states require registration but do not impose disabilities upon registrants.[35] It is probable that most of the provisions of these statutes have been superseded by federal legislation. The registration statutes duplicate and enlarge the federal registration scheme. Nearly all of them differ from the federal scheme in one or more respects. Some are accompanied by provisions outlawing the Communist Party. Because of the probable conflict of provisions, there is a much clearer case for pre-emption with reference to these statutes than there is with respect to the sedition statutes invalidated by the *Nelson* case. *Hines v. Davidowitz*,[36] in which the Federal Alien Registration Act of 1940 was held to supersede a Pennsylvania alien registration statute, provides a close analogy. Moreover, the breadth and thoroughness of the federal scheme make it easier to infer a pre-emptive intent on the part of Congress.[37] It is not surprising that the Michigan Supreme Court in *Albertson v. Attorney General*,[38] held that Michigan's comprehensive communist control law had been superseded by the similar provisions of federal communist control measures.

The effect of *Nelson* on other state measures dealing with communist subversion[39] is more difficult to predict. Relatively circumscribed measures concerned with the loyalty of public employees or of occupational groups in which the state has a special regulatory interest would appear to be unaffected by the *Nelson* case and thus remain enforceable. The only direct authority thus far, a decision of the Florida Supreme Court upholding the loyalty oath required of Florida's state employees,[40] supports this conclusion. Persuasive

34. Alabama, Louisiana, Michigan, and Texas. The statutes are described in DIGEST, *op. cit. supra* note 15, at 383–402.

35. Arkansas, Delaware and New Mexico.

36. 312 U.S. 52 (1941).

37. It should be noted that the Department of Justice, which opposed a finding of pre-emption with respect to state sedition statutes, has indicated that state communist control measures were governed by different considerations and were probably invalid. Brief for the United States as Amicus Curiae, p. 38 n.24, Pennsylvania v. Nelson, 350 U.S. 497 (1956).

38. 345 Mich. 519, 77 N.W.2d 104 (1956). Prior to the *Nelson* case, a divided three-judge federal district court had upheld the same statute. Albertson v. Millard, 106 F. Supp. 635 (E.D. Mich. 1952), *vacated on other grounds*, 345 U.S. 242 (1953). See also Knox v. State, 38 Ala. App. 482, 87 So. 2d 671 (1956), where the question of the validity of Alabama registration provisions was not reached.

39. See DIGEST, *op. cit. supra* note 15, at 324–82, 410–34.

40. State v. Diez, 97 So. 2d 105 (Fla. 1957). See also First Unitarian Church v. Los Angeles, 48 Cal. 2d 419, 441, 311 P.2d 508, 522 (1957), *rev'd on due process*

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indirect authority may be found in the refusal of the Supreme Court, on several occasions, to consider this question in reviewing state decisions.[41] The explanation lies in the vital interest which the states have in controlling eligibility for public office and public employment. No federal statutes deal directly with these matters and federal power to do so is subject to question.[42]

Serious problems are raised, however, by various state laws denying the use of election facilities, and other rights and privileges, to the Communist Party and other subversive organizations. These restrictions are in accord with federal policy—the Communist Control Act of 1954 declares that these organizations are not entitled to any rights, privileges, or immunities granted by the states or by the United States.[43] The state statutes may effect a greater or lesser deprivation, or there may be an exact coincidence. In either case it is arguable, though perhaps improbable, that the state provisions have been superseded by the blanket federal termination of "rights, privileges, and immunities," at least in elections for federal offices.

It is also possible that loyalty programs not limited to public employees or other occupational groups of special state concern (such as lawyers and teachers) have been superseded. Measures applying to all state residents can be justified only as a sanction on subversive conduct. Since the states, in the absence of facts giving rise to a local breach of the peace, may no longer impose criminal sanctions on subversive conduct, it is arguable that civil sanctions have also been precluded. Several state courts have rejected this argument, but the Supreme Court has not yet passed on it.[44]

The *Nelson* case would also appear to have a restrictive effect of indeterminate proportions on the power of state legislatures to investigate subversive activities. Legislative inquiries which affect individual liberties are permitted only when a public need to obtain information on which to base legislation concerning a recognized

ground without reaching question of pre-emption, 357 U.S. 545 (1958) (denial of tax exemption to organization declining to file a declaration that it does not advocate forceful overthrow of government).

41. See, *e.g.*, Speiser v. Randall, 357 U.S. 513, 517 n.3 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (issue presented but not decided).

42. *Cf.* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947).

43. 68 Stat. 776 (1954), 50 U.S.C. § 842 (Supp. IV 1957). Apparently the only case to have arisen under these provisions is Salwen v. Rees, 16 N.J. 216, 108 A.2d 265 (1954), in which section 3 of the act was upheld as a basis for denying a candidate the right to appear on the ballot under the Communist Party label in a local election.

44. First Unitarian Church v. Los Angeles, 48 Cal. 2d 419, 441, 311 P. 2d 508, 522 (1957), *rev'd on other grounds*, 357 U.S. 545 (1958); Wyman v. Uphaus, 100 N.H. 436, 440, 130 A.2d 278, 282 (1957) *aff'd*, 360 U.S. 72 (1959); Kahn v. Wyman, 100 N.H. 245, 123 A.2d 166 (1956). Compare Speiser v. Randall, 357 U.S. 513, 527 (1958).

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public evil justifies the intrusion. If the states lack effective legislative power with respect to a particular matter, such as sedition, it would seem that the power to conduct legislative inquiries leading toward such legislation would be reduced in scope. Of course, so long as states are free to impose a wide range of civil disqualifications on alleged subversives, a wide-ranging legislative inquiry into subversive activities within the state could be based on the need to ascertain the factual basis for such legislation.[45]

These predictions indicate that the effect of the *Nelson* case on state power may not be very great. The decision, if taken in its broadest sweep, had potentialities of curtailing all state activity with respect to subversion and loyalty. Though state courts have given the decision wider effect, the Supreme Court has been reluctant to treat it as restricting any state activity other than criminal prosecutions for sedition. Withdrawal of this limited area from state action has little significance since the states had demonstrated little desire to utilize the various criminal proscriptions of sedition and related crimes. Conduct involving violence, destruction of property or other breaches of the peace remains within the criminal jurisdiction of the states. The probable displacement of state registration schemes is also of slight significance since these statutes had proved unworkable and were completely inoperative prior to the *Nelson* case. The major areas in which the states have active interests — legislative investigations and loyalty programs for public employees and other special groups — have not been affected.

If the practical significance of the *Nelson* case on state power is slight, the furor it has aroused is explained by other factors: the dissatisfaction of congressmen who felt that congressional intent had been misread; the pique of states' rights advocates who believed that the decision had made huge inroads upon state power; and the symbolic demonstration of how the Court's doctrine of federal "occupation of the field" could effect broad displacements of state authority in the absence of any manifestation of congressional intent or conflict of statutory provisions. The Court's assertion that communist sedition is a matter of paramount interest to the federal government is perfectly sound. While the states had a major interest in sedition in the bygone days of its use in controlling the disruptive effects of street-corner anarchist speeches, the modern problem of subversion by a tightly organized conspiracy is a national problem calling for a national solution. Consequently, whatever

45. State power to conduct legislative investigations of subversive activities has been sustained against a pre-emption argument in Wyman v. Uphaus, 100 N.H. 436, 440, 130 A.2d 278, 282 (1957), and Kahn v. Wyman, 100 N.H. 245, 123 A.2d 166 (1956). The petitioner in the *Sweezy* case made a pre-emption argument in the Supreme Court, but the Court disposed of the case without reaching the question.

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the merits of the decision may be, congressional reversal seems less and less likely as time goes by.

In June, 1959, after this Article was written, the Supreme Court decided *Uphaus v. Wyman.*[45a] While the *Uphaus* case is primarily significant as a retrenchment from the position taken in *Sweezy v. New Hampshire,*[45b] with respect to state legislative investigations of subversive activity, a five-man majority went out of its way to scotch claims that the *Nelson* case had the effect of curtailing virtually all state activity in the field of subversion and loyalty. The decision therefore provides convincing support for my earlier conclusions, which I have left unchanged, concerning the probable effect of the *Nelson* case.

The *Uphaus* case, however, does necessitate some further discussion since it appears to consign the *Nelson* case to the limbo reserved for precedents confined to their narrow facts. I have argued that the reasonable intendment of *Nelson* is to prohibit any state sedition prosecution in which the evidence also establishes an attempt to overthrow the federal government. In *Uphaus* the Court states categorically that *Nelson* did not deprive the states of the right to punish sedition directed against them. If this is to have any meaning where communist activity is involved, *Nelson* is restricted to the improbable situation in which the state prosecutor fails to allege that the defendants' actions were directed against the state as well as the federal government. This is so because of the nature of the communist movement. Communist sedition almost inevitably is directed against both the federal government and the state government. On the other hand, if the Court means to foreclose the states from prosecuting when the activity is directed against both federal and state governments, then the *Uphaus* dictum has little significance.

The Court in *Uphaus* states that "All the *[Nelson]* opinion proscribed was the race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecution for sedition against the State itself. . . ."[45c] These statements were unnecessary to the holding that *Nelson* did not foreclose state legislative investigations of subversive activity since many facets of subversive conduct were clearly unaffected by the *Nelson* case and a legislative investigation could always be predicated on this continuing state power. But dictum or not, the difficulties created by this considered statement must be taken into account.

The Court apparently overlooked the fact that the Smith Act

45a. 360 U.S. 72 (1959).
45b. 354 U.S. 234 (1957).
45c. 360 U.S. at 76.

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proscribes overthrow of state governments as well as of the federal government.[45d] Thus a race of prosecutors to the courthouse door is still possible even when the conduct theoretically is directed solely against the state. And, as has already been mentioned, the Court ignored the basic fact that communist sedition is almost inevitably directed against both levels of government. Thus, it is still impossible to predict whether or not a state may prosecute a member of the Communist Party under a state sedition statute.

The *Uphaus* dictum also appears to reject the test set forth in *Nelson*—whether or not the conduct involved a local breach of the peace. Instead, state jurisdiction appears to turn on nothing more than the form of the indictment. The *Nelson* test was at least understandable and workable. The *Uphaus* test, if it has any significance at all, is a retreat to strict formalism which has neither virtue. Whatever the merits of the *Nelson* case, it seems unwise for the Court to play so loosely with it. The *Uphaus* dictum will be considered as a retraction from the position taken in *Nelson*, and the general public will not fail to conclude that the Court has bowed to hostile comment and congressional pressure.

II. Limitations on State Legislative Investigations

The power of state legislatures to compel testimony during the conduct of legislative investigations is unquestioned, but the constitutional limitations on this power have been relatively unexplored. In *Sweezy v. New Hampshire*,[46] the Supreme Court for the first time considered the right of witnesses to remain silent before state legislative committees. Although the decision suggests that the interest in free expression of ideas will outweigh a state's need for information, at least when subversive activities are involved, the case provides little guidance as to the controlling factors in balancing the interest of the state against the constitutional rights of the witness. Since the *Sweezy* case grows out of the more developed law dealing with limitations on congressional investigating power and builds on the foundation laid in the companion case of *Watkins v. United States*,[47] a brief survey of the federal development seems necessary before we turn to the special problems in the state area. Finally, a quick survey of recent developments will attempt to assess the probable effect of *Sweezy* and *Watkins*.

A. Limitations on congressional power

Various constitutional provisions have been relied upon as im-

45d. 18 U.S.C. § 2385 (1952).
46. 354 U.S. 234 (1957).
47. 354 U.S. 178 (1957).

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posing constitutional limitations on the power of Congress to compel testimony in congressional investigations.[48] The fifth amendment privilege against self-incrimination has proved to be the surest means of frustrating congressional questioners, but at a cost which the witness often finds too great. Initially there was some doubt whether the privilege was applicable to legislative investigations as distinguished from judicial proceedings. Lower federal courts took the initiative in recognizing the applicability of the privilege to legislative investigations,[49] and this view is now firmly established.[50] The marked tendency in recent years to relax the showing which must be made by a witness claiming the privilege[51] has made the fifth amendment the most popular refuge of reluctant witnesses. But the use of the privilege may be disadvantageous even though a claim of privilege is almost certain to be upheld whenever the questions relate to alleged communist activities. In the first place, adverse publicity is almost inevitable. Secondly, if security tests are prevalent in the field of public or private employment in which the witness is engaged, the use of the privilege may result in discharge and loss of employment opportunities. It is for this reason that one of the crucial issues in recent years has been the extent

48. See Driver, *Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees*, 38 VA. L. REV. 887, 1011 (1952); Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 COLUM. L. REV. 416 (1947); Note, *The Power of Congress To Investigate and To Compel Testimony*, 70 HARV. L. REV. 671 (1957).

49. See, *e.g.*, Aiuppa v. United States, 201 F.2d 287 (6th Cir. 1952); United States v. Costello, 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

50. Bart v. United States, 349 U.S. 219 (1955); Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

51. A witness claiming the privilege was originally required to show that his answers might disclose a material element of a crime. 8 WIGMORE, EVIDENCE §§ 2260–61 (3d ed. 1940). This rule was ameliorated by Counselman v. Hitchcock, 142 U.S. 547 (1892), which held that a witness is privileged not to answer even a seemingly harmless question if the answer to that question would enable a prosecutor to discover incriminating evidence or otherwise tend to prove the commission of a crime. But until the last few years the witness was required to show that the apprehended danger was "'real and appreciable . . . in the ordinary course of things'" and not so "'improbable that no reasonable man would suffer it to influence his conduct.'" Mason v. United States, 244 U.S. 362, 365–66 (1917). The *Mason* case has been quietly laid to rest by Hoffman v. United States, 341 U.S. 479 (1951), and a series of per curiam reversals of lower federal court decisions which had followed the *Mason* test. Trock v. United States, 351 U.S. 976 (1956); Singleton v. United States, 343 U.S. 944 (1952); Greenberg v. United States, 343 U.S. 918 (1952). Present law upholds the claim of the privilege if the witness can show any imaginable connection, not wholly incredible, between a possible answer to a question and a crime. The limits of human imagination being what they are, the result is that a witness willing to claim the privilege can rarely be compelled to answer. Relaxation of the showing necessary for a claim of the privilege was made necessary by the complexity of the rules relating to waiver of the privilege by answering seemingly harmless questions. See Rogers v. United States, 340 U.S. 367 (1951). See generally Note, *The Privilege Against Self-Incrimination in the Federal Courts*, 70 HARV. L. REV. 1454, 1455–58 (1957).

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to which adverse inferences might be drawn from the use of the privilege against self-incrimination.[52]

The disadvantages of relying on the privilege against self-incrimination have led to an exploration of other constitutional provisions as limitations on congressional investigations. The fourth amendment prohibition of unreasonable searches and seizures has been suggested as a limit on the breadth of legislative demands to produce documents,[53] but this seems doubtful since a physical invasion of the witness's person or premises is not involved.[54] The emphasis on political activity and beliefs in congressional investigations of the last few decades has led to numerous attempts to justify refusals to testify under the first amendment guarantee of freedom of speech.[55] Although first amendment rights have been recognized in several cases, in each case the legislative need for information has been held to outweigh the individual's interest.[56] Thus reliance on the first amendment has proved unsuccessful when congressional investigations have been involved. The impact of various inquiries on first amendment rights, however, has been a significant factor in the development of statutory, procedural and due process limitations on congressional investigations.

Three principal limitations have been developed. First, the investigation must have a valid legislative purpose in seeking information concerning a subject with which Congress may legislate.[57] Second, the investigating committee must have been specifically authorized by Congress to conduct the investigation in question.[58]

52. See text accompanying notes 157–59, 169–71 *infra*.

53. See United States v. Groves, 18 F. Supp. 3, 4 (W.D. Pa. 1937); *cf.* FTC v. American Tobacco Co. 264 U.S. 298, 305–06 (1924); Boyd v. United States, 116 U.S. 616, 634–35 (1886).

54. See Note, *The Power of Congress To Investigate and To Compel Testimony*, 70 HARV. L. REV. 671, 673–74 (1957).

55. See, *e.g.*, Barsky v. United States, 167 F.2d 241, 254 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948) (dissenting opinion). See Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 YALE L.J. 1159 (1956).

56. See, *e.g.*, Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 335 U.S. 899 (1948).

57. Kilbourn v. Thompson, 103 U.S. 168, 194–95 (1880). But a proper legislative purpose is presumed if the matter under inquiry is one with respect to which Congress might validly legislate. McGrain v. Daugherty, 273 U.S. 135, 177–78 (1927); United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

58. See, *e.g.*, United States v. Lamont, 236 F.2d 312 (2d Cir. 1956) (indictment must allege authorization of legislative committee to conduct investigation in question); United States v. Orman, 207 F.2d 148 (3d Cir. 1953); Rumely v. United States, 197 F.2d 166 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) (narrow construction of congressional authorization).

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And finally, the questions asked must be "pertinent to the question under inquiry."[59] These limitations, applied rather strictly because of the involvement of constitutional rights, have their source both in the contempt of Congress statute[60] and in the Constitution.

In *Watkins v. United States*,[61] the Supreme Court, fusing first amendment arguments and existing procedural limitations, evolved a new and somewhat confusing procedural limitation on congressional investigative power. Watkins, a labor organizer, was summoned to appear before a subcommittee of the House Committee on Un-American Activities after two witnesses had testified that he had been a member of the Communist Party in 1944. Watkins denied that he had been a communist and answered freely all questions relating to his political activities and associations. He declined, however, to answer questions relating to the political activities of past associates whom he did not believe were presently members of the Communist Party.[62] He did not invoke the privilege against self-incrimination, but contended that the committee had no power to ask such questions and that they were not relevant to any valid legislative purpose. For his refusal to answer, Watkins was indicted and convicted for statutory contempt of Congress. The Court of Appeals for the District of Columbia, sitting en banc, affirmed the conviction.[63]

The Supreme Court reversed Watkins' conviction.[64] The majority

59. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1952). See United States v. Orman, 207 F. 2d 148 (3d Cir. 1953); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950).

60. The contempt of Congress statute makes it a misdemeanor for any person "who having been summoned as a witness by the authority of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry. . . ." REV. STAT. § 102 (1875), as amended, 2 U.S.C. § 192 (1952).

61. 354 U.S. 178 (1957). The *Watkins* case is discussed in the following articles and notes, among others: Fleischmann, *Watkins v. United States and Congressional Power of Investigation*, 9 HASTINGS L.J. 145 (1958); Nathanson, *The Supreme Court as a Unit of the National Government: Herein of Separation of Powers and Political Questions*, 6 J. PUB. L. 331 (1957); Nutting, *The Watkins Case—A Critique*, 43 A.B.A.J. 1029 (1957); Note, *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 141–46 (1957); Comment, 56 MICH. L. REV. 272 (1957); Comment, *Congress v. The Courts: Limitations on Congressional Investigation*, 24 U. CHI. L. REV. 740 (1957).

62. Watkins said:

> I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past.

354 U.S. 178, 185 (1957).

63. Watkins v. United States, 233 F.2d 681 (D.C. Cir. 1956).

64. 354 U.S. 178 (1957). The Chief Justice wrote for the majority of six. Mr.

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opinion by the Chief Justice, a long and discursive essay on legislative investigations and constitutional rights, is lacking in clarity. But as Mr. Justice Frankfurter emphasized in his concurring opinion, the narrow holding of the case is only that the vagueness of the authorizing resolution and the undefined scope of the subcommittee inquiry failed to satisfy the due process requirements of definiteness.[65]

The House of Representatives had authorized the Un-American Activities Committee and its subcommittees to investigate all aspects "of un-American propaganda . . . [which] attacks the principle of the form of government as guaranteed by our Constitution. . . ."[66] This resolution was thought to be so vague and broad that it did not inform Watkins what questions it authorized the subcommittee to ask. Nor did the subcommittee chairman, at the opening of the hearing, explain the scope and nature of the inquiry with sufficient particularity to enable Watkins to determine what questions would be relevant to the matter under inquiry.[67] The statute under which Watkins was convicted condemns only a refusal to answer questions which are "pertinent" to the inquiry, thus making pertinency an element of the offense.[68] Since Watkins was put in the position of being unable to ascertain the conduct required of him by law, due process standards of definiteness in criminal prosecutions were violated by his conviction.[69]

This holding marks some advance over prior doctrine, but it is

Justice Frankfurter joined the opinion of the Court, but also filed a supplemental concurring opinion stressing the narrow grounds of decision. Mr. Justice Clark was the lone dissenter, and Justices Burton and Whittaker did not participate.

65. 354 U.S. at 216–17 (concurring opinion). The vagueness argument accepted in *Watkins* had been rejected by the Second Circuit in United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), and the Supreme Court had denied certiorari. 335 U.S. 899 (1948).

66. H.R. Res. 5, 83d Cong., 1st Sess., 99 CONG. REC. 15, 18 (1953).

67. I am satisfied from a reading of the record that Watkins was not laboring under any misapprehension concerning the nature of the inquiry — it was part of a continuing investigation of communist infiltration of important labor unions. See the dissenting opinion of Mr. Justice Clark, 354 U.S. at 225–27.

68. The Court's emphasis on the use of the statutory contempt procedure raises the question whether Congress could circumvent the holding by returning to the older practice of direct contempt of Congress. A person committed by action of Congress itself can test the legality of his detention in a habeas corpus proceeding. Kilbourn v. Thompson, 103 U.S. 168 (1880). And pertinency of the questions to a valid legislative inquiry would appear to be a constitutional issue open on habeas corpus. Thus any attempt by Congress to override the *Watkins* case is likely to raise serious constitutional questions. Of course, the practical inconvenience of a trial by the House would tend to deter Congress from reverting to this practice.

69. See United States v. Harris, 347 U.S. 612 (1954); United States v. Cardiff, 344 U. S. 174 (1952); Winters v. New York, 333 U.S. 507 (1948); Musser v. Utah, 333 U.S. 95 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

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not a startling or unexpected development. The surprising features of the *Watkins* case are the suggestions in the opinion of the Chief Justice that congressional investigations will be subjected in the future to delegation of power and first amendment limitations.

The emphasis on delegation of power comes in a portion of the opinion which stresses the separation of responsibility for exercise of investigative power from the actual exercise of that power.[70] The concern is with the relationship between the legislative body and the investigative body, and the requirement is that the legislature set forth with some clarity the authority of the investigatory body to conduct an investigation serving a valid legislative purpose. The vice of unconfined discretion in investigation is twofold: it is impossible for the witness to know whether or not the questions are pertinent to a valid inquiry, and, in addition, it is impossible for a court to know whether the parent body really wants the information being gathered by its investigators. The former is merely a restatement of the due process vagueness objection; the latter is apparently based on a concern that judicial review will be frustrated if the legislature does not circumscribe the authority of its investigators in terms which a court can assess.

One emphatic statement in the Chief Justice's opinion deserves repeating: " . . . there is no congressional power to expose for the sake of exposure."[71] the basis for this asserted limitation on the scope of legislative power presumably is that exposure is a form of punishment for past acts which is an exclusive judicial function. The legislature has no power to conduct proceedings which are essentially trials of guilt without the procedural safeguards of a judicial proceeding controlled by an independent judiciary. This is a common-sense formulation of the objections many persons have felt to the more flamboyant congressional investigations. The Court's vigorous statement of this view, premised on the concept of separation of powers, exemplifies the way in which an unfashionable constitutional doctrine may re-emerge in a different era with renewed vitality.[72]

70. 354 U.S. at 200–06.

71. *Id.* at 200.

72. In Kent v. Dulles, 357 U.S. 116, 129 (1958), the Court said:

> If that 'liberty' [right of exit from the United States] is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities of enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.

In United States v. Sharpnack, 355 U.S. 286 (1958), Mr. Justice Douglas, in a dissenting opinion, relied on an illegal delegation of power argument in attacking the constitutionality of the Assimilative Crimes Act of 1948. Youngstown Sheet & Tube

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The doctrine of separation of powers figured prominently in the Court's first contact—in 1881—with the use of the subpoena power to compel testimony by private citizens before a congressional investigating committee. In *Kilbourn v. Thompson*[73] this doctrine was utilized to supply a holding that Congress, in conducting an investigation into the operation of a real estate pool in which the United States had a creditor's interest, usurped the judicial function and thus exceeded its own power. Subsequent cases cast doubt on the separation of powers rationale,[74] but *Watkins* appears to have given it a rebirth. If so, the validity of the so-called "ventilating" investigation, in which Congress seeks to educate and inform the public in order to arouse popular support for particular legislation, is questionable. The Court, however, is careful to say: "The public is, of course, entitled to be informed concerning the workings of its government."[75] This and other statements leave the impression that "exposure" may have a wider scope when it is government officials, rather than private citizens, who are being grilled.[76]

The impact of legislative investigations on first amendment rights is sketched in equally broad fashion in *Watkins*. The first amendment is applicable to legislative investigations because they are "part of lawmaking."[77] The interest protected is the individual's right to participate fully in the political process without answering to the state for that activity, as well as the indirect inhibition of political discussion which may result from a fear that expression of unorthodox views may lead to public obloquy. To compel a witness to testify "against his will, about his beliefs, expressions or associations is a measure of government interference"[78] with first amendment freedom which is not to be allowed in the absence of a clear

Co. v. Sawyer, 343 U.S. 579 (1952), is premised on the doctrine of separation of powers.

73. 103 U.S. 168 (1880).

74. In United States v. Rumely, 345 U.S. 41, 46 (1953), the Court spoke of "the loose language of *Kilbourn* v. *Thompson*" and "the inroads that have been made upon that case by later cases." See also, McGrain v. Daugherty, 273 U.S. 135, 177–80 (1927); United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

75. 354 U.S. at 200.

76. The most central of congressional investigating powers is that of determining whether various branches of the federal government are executing the laws in an efficient, honest manner. The Court's opinion in *Watkins* recognized this: "We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." 354 U.S. at 200 n.33 (1957). See also *id.* at 187.

77. *Id.* at 197. Under this view the "law" abridging speech is the prospective legislation which the investigation may precede. It would seem more plausible to regard the congressional resolution as a "law" for the purposes of the first amendment.

78. 354 U.S. at 197.

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showing that the public necessity for the information outweighs the inevitable impact on individual freedom. And it is not only the effect on the witness which is relevant, but the indirect effect on the climate of opinion and general freedom of expression. The Court, in the last analysis, must strike this balance; but in order to do so it must be able to measure the legislative need for the information. In order to weigh this need against the competing demands of individual expression, a "clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need" must be provided.[79] The devitalization of judicial review once again appears to be the vice which leads the Court to demand clarity of legislative authorizations.

This jumble of constitutional and procedural limitations—the pertinency of the questions to the inquiry, the validity of the delegation to the committee, the constitutional validity of the legislative purpose, and the impact of the investigation on first amendment guarantees—necessarily entails considerable confusion. But it is doubtful that the confusion is entirely unintentional. In *Watkins* a substantial majority of the Court has joined in an opinion which combines exhortation with warning. Without deciding any questions of power, it has cautioned Congress that the unrestricted intrusion of legislative investigations into private affairs will not, if continued, go unchecked. Meanwhile, new procedural limitations will operate to protect witnesses and enhance judicial review.

B. Limitations on state legislative investigations

Many of these principles are also relevant to the power of state legislatures to compel testimony in the course of legislative investigations. The scope of state investigatory power is a question of state law and varies from state to state depending upon the respective constitutional provisions and their judicial interpretation. In general, the investigatory power of the state legislatures, like that of Congress, may be employed whenever appropriate to an exercise of recognized legislative powers.[80] Similarly, the four-

79. *Id.* at 205.

80. The following state cases deal with legislative power to compel testimony: *Ex parte* Coon, 44 Cal. App. 2d 531, 112 P.2d 767 (1941); State *ex rel.* Benemovsky v. Sullivan, 37 So. 2d 907 (Fla. 1948); Opinion of the Justices, 331 Mass. 764, 119 N.E.2d 385 (1954); Wyman v. Uphaus, 100 N.H. 436, 130 A.2d 278, *aff'd per curiam after reargument*, 101 N.H. 139, 136 A.2d 221 (1957); Kahn v. Wyman, 100 N.H. 245, 123 A.2d 166 (1956); Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954); Smith v. Kern, 285 N.Y. 632, 33 N.E.2d 556 (1941); *In re* Joint Legislative Comm., 285 N.Y. 1, 32 N.E.2d 769 (1941); *In re* Martens, 109 Misc. 492, 180 N.Y. Supp. 171 (Sup. Ct. 1919); State v. Morgan, 167 Ohio St. 295, 147 N.E.2d 847 (1958); Fawick Airflex Co. v. Electrical Workers, 56 Ohio L. Abs. 419, 92 N.E.2d 431 (Ct. App.), *appeal dismissed*, 154 Ohio St. 206, 93 N.E.2d

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teenth amendment to the federal constitution imposes significant limitations on the exercise of investigative powers by state legislatures. Freedom of speech and related freedoms are fundamental rights protected against state abridgment through the due process clause of the fourteenth amendment.[81] The fourth and fifth amendments, however, are not fully incorporated in the fourteenth amendment[82] and state action involving unreasonable searches or self-incrimination falls within the ban of the due process clause only if the challenged action is thought to violate those minimal standards which are "of the very essence of a scheme of ordered liberty."[83] Thus the fourth and fifth amendments may not be relied on directly, but only as the due process clause itself secures the minimal decencies of civilized society.[84]

In *Sweezy v. New Hampshire*,[85] the Court's dicta in *Watkins* are the foundation for a holding which merges first amendment and due process notions. In 1951 New Hampshire enacted a Subversive Activities Act[86] which imposed various disabilities on "subversive persons" and "subversive organizations." In 1953 a resolution of the legislature[87] constituted the attorney general a one-man legislative committee to investigate violations of the 1951 act and to recommend additional legislation. Sweezy, a noncommunist Marxist, was summoned to testify at the investigation conducted by the attorney general pursuant to this authorization. Sweezy testified freely about many matters but refused to answer two types of questions: (1) in-

480 (1950); Matson v. Jackson, 368 Pa. 283, 83 A.2d 134 (1951); State v. James, 36 Wash. 2d 882, 221 P.2d 482 (1950), *cert. denied*, 341 U.S. 911 (1951); State *ex rel.* Robinson v. Fluent, 30 Wash. 2d 194, 191 P.2d 241 (1948), *cert. denied*, 335 U.S. 844 (1948).

81. Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652 (1925).

82. See Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46 (1947).

83. The phrase is that of Mr. Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937). See also Adamson v. California, 332 U.S. 46 (1947).

84. Knapp v. Schweitzer, 357 U.S. 371 (1958), is a dramatic illustration of the limited protection the federal constitution provides against self-incrimination in a state proceeding. The Court held that it was not a denial of due process for the state to compel Knapp, over his objection, to testify as to matters which might incriminate him under federal law, at least where there was no showing that federal officers had induced or participated in the testimonial compusion. This is so even though the compelled testimony may be the basis of a federal prosecution. Feldman v. United States, 322 U.S. 487 (1944); *cf.* Bartkus v. Illinois, 359 U.S. 121 (1959) (state conviction for bank robbery may follow federal acquittal for same acts). And the Court has recently held that the fact that federal officers have cooperated with state officials does not make the fifth amendment available. Mills v. Louisiana, 360 U.S. 230 (1959).

85. 354 U.S. 234 (1957).

86. N.H. REV. STAT. ANN. §§ 588:1–16 (1955).

87. N.H. Laws 1953, ch. 307. See Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954).

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quiries concerning the activities of the Progressive Party in New Hampshire during the 1948 election campaign; and (2) inquiries concerning a lecture Sweezy had delivered during 1954 to a class at the University of New Hampshire.[88] For these failures to answer, Sweezy was adjudged in contempt by a state court. The New Hampshire Supreme Court, while recognizing that the legislative investigation impaired Sweezy's first amendment rights, affirmed the contempt commitment on the ground that the state's interest in uncovering subversive activities within the state justified the impairment.[89]

The Supreme Court reversed, but no opinion was able to obtain a clear majority of the Court.[90] The Chief Justice, joined by Justices Black, Douglas, and Brennan, began by reaffirming the position taken in the *Watkins* case that legislative investigations may easily encroach on first amendment rights. He then turned his fire on the New Hampshire Subversive Activities Act of 1951, to which the scope of the attorney general's authority had been tied by the authorizing resolution. The definition of "subversive persons" and "subversive organizations" in this act were said to be so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done completely free of any conscious intent to be a part of such activity."[91] The opinion then went on to discuss gratuitously and at some length the importance of academic freedom and political expression, emphasizing that a strong showing of justification would be necessary to permit any infringement in these areas.[92] Finally, the Chief Justice concluded, it was unnecessary in this case to balance the interest of the state against the rights of the individual — the resolution authorizing the investigation was so broad and unlimited that a valid state interest had not been expressed.

> The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what

88. No question with respect to a state's power to investigate activities at a state-supported university was presented, since the New Hampshire Supreme Court had held that this purpose was not within the authority conferred on the attorney general. Hence the questions relating to the lecture could only be upheld as they related to Sweezy as a possible "subversive person."

89. Wyman v .Sweezy, 100 N.H. 103, 121 A.2d 783 (1956).

90. Sweezy v. New Hampshire, 354 U.S. 234 (1957). Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined, concurred in the result, but on another ground. Mr. Justice Clark dissented in an opinion which Mr. Justice Burton joined. Mr. Justice Whittaker did not participate.

91. *Id.* at 247.

92. *Id.* at 249–52.

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witness will be summoned and what questions will be asked. *In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.*[93]

Four members of the Court, in concurring and dissenting opinions, took vigorous issue with the Chief Justice for suggesting that the conviction was invalid because of the legislature's failure to provide adequate standards for the attorney general. They argued that the apportionment and delegation of powers within a state government are matters of state law beyond the reach of the fourteenth amendment.[94] Since the New Hampshire court had determined that the attorney general had acted within the scope of the authority granted him by the legislature, the Court was required to balance the legislative need for the information against the impairment of first amendment rights which the investigation entailed. Mr. Justice Frankfurter, joined by Mr. Justice Harlan, concluded that the individual must prevail in this case because there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state;[95] whereas Mr. Justice Clark, joined by Mr. Justice Burton, arrived at the opposite conclusion that New Hampshire's interest in self-preservation justified the intrusion into Sweezy's personal affairs.[96]

The most puzzling aspect of the *Sweezy* case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the state had not demonstrated that it wanted the information seems so unreal as to be incredible. The state had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities; the attorney general had exercised this power in questioning Sweezy; and the New Hampshire courts had determined that the attorney general was acting within his delegated authority. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations,[97] a holding that a state legislature cannot delegate such a power. It seems unlikely that the view of the Chief Justice, which has yet to commend itself to a majority of the Court, will be accepted in the long-run.

The narrower due process holding of *Watkins*, however, is likely

93. *Id.* at 253. (Emphasis added.)
94. See, *e.g.*, Dreyer v. Illinois, 187 U.S. 71, 84 (1902). *But cf.* Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (dictum).
95. 354 U.S. at 260–67 (concurring opinion).
96. *Id.* at 270 (dissenting opinion).
97. *Id.* at 255.

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to be more durable. In *Scull v. Virginia*[98] a contempt conviction for refusal to answer questions put by a Virginia legislative committee was reversed by a unanimous Court on the ground that the committee had failed to inform the witness in what respect the questions were pertinent to the inquiry. Witnesses in state investigations, as well as federal, must be clearly apprised of the basis of the questions in order that they may have a fair opportunity to determine whether or not they are required to answer the particular questions.

C. The Barenblatt and Uphaus cases

The brave, if confusing, language of *Watkins* and *Sweezy* represented a substantial shift of mood on the part of the Court. Legislative investigations were no longer to be immune from judicial scrutiny. Yet the generative power of the two cases remained very problematical.

The *Watkins* case was the more conventional holding. Its initial effect was to encourage lower federal courts to interpret strictly congressional authorizing resolutions[99] and to require congressional committee chairmen to clarify the pertinence of particular questions to the matter under inquiry.[100] But any prediction that the Court would impose severe restrictions on the power of congressional investigation itself was destroyed by *Barenblatt v. United States*[101] which reflected a partial retreat from the position taken in *Watkins* as well as a clarification of questions it had left open.

A crucial question left unsettled by *Watkins* was whether vagueness and breadth of an authorizing resolution is itself bad. If so, the organization of congressional investigating committees would be substantially affected. Standing committees with broad authorizations and settled jurisdiction would be precluded from conducting investigations requiring use of the subpoena power. This would force Congress to create *ad hoc* committees for the purpose of conducting particular investigations. This issue appears to have been settled by the 5–4 decision in *Barenblatt*, where the majority took the position that a clarification at the hearing by the committee chairman of the nature and scope of the inquiry satisfies the due process requirements laid down in *Watkins*. Since the opinion in *Watkins* appeared to view a precise authorizing resolution and an

98. 359 U.S. 344 (1959).

99. *E.g.*, Brewster v. United States, 255 F.2d 899 (D.C. Cir. 1958) (authorization of Senate Committee on Government Operations not sufficiently clear to compel labor union official to testify concerning misuse of union funds).

100. See Flaxer v. United States, 358 U.S. 147 (1958); Sacher v. United States, 356 U.S. 576 (1958) (per curiam).

101. 360 U.S. 109 (1959).

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on-the-spot clarification by the committee chairman as alternative methods of demonstrating the pertinency of particular questions, the *Barenblatt* interpretation seems correct.

On the issues of the pertinency of the questions and the constitutional rights of the individual, the *Barenblatt* majority adheres to the doctrine stated in *Watkins*, but its application of that doctrine reflects a more hospitable approach to congressional investigation. Barenblatt was a graduate student and teaching fellow at the University of Michigan from 1947 to 1950 and an instructor in psychology at Vassar Colege from 1950 to shortly before he was subpoenaed by a subcommittee of the House Committee on Un-American Activities. The subcommittee was conducting an inquiry concerning alleged communist infiltration into the field of education. Barenblatt refused on first amendment grounds to answer five questions pertaining to Communist Party membership and alleged communist activities of himself and another person while at the University of Michigan. On appeal from his conviction for these refusals to answer, Barenblatt contended that he was not adequately apprised of the pertinency of the subcommittee's questions to the subject matter of the inquiry and that he was privileged to refuse to answer because the questions infringed rights protected by the first amendment.

The Court, after indicating that Barenblatt had not properly raised the issue of pertinency by making a specific objection on this ground to the subcommittee, went on to conclude that the pertinency of the questions was clear from the record. It relied on many of the same features which had been present in *Watkins*, such as a general announcement of the subcommittee's purposes, but also on the additional features that Barenblatt, unlike Watkins, had refused to answer questions about his activities; that Barenblatt had heard other witnesses being interrogated concerning the announced subject matter; and that all the questions related to education whereas in *Watkins* a small number fell outside the announced subject matter.

On the central issue of first amendment rights, the opinion of Mr. Justice Harlan for five members of the Court adopts the relativistic position represented by such decisions as *Dennis v. United States*[102] and long championed by Mr. Justice Frankfurter: the Court must balance the rights of the competing private and public interests. The Court in performing this difficult task concluded that the field of education was not immune from all inquiry merely because of its importance to the free flow of ideas, and that investigation of communist infiltration into the field of education related to a valid legis-

102. 341 U.S. 494 (1951).

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lative purpose. The dominant aim of the inquiry was said not to be with abstract ideas but with the unlawful advocacy of overthrow of government. Under the circumstances of the case, the Court concluded, the governmental interest in disclosure outweighed the individual's interest in standing mute.

The significance of *Barenblatt* lies in the premises which the majority of the Court will utilize when weighing the private and public interests involved in each case. Most important, the motives of the investigators will not be scruitinized but legitimacy will be assumed if a valid legislative purpose is at hand. The governmental interest, particularly of Congress, in informing itself about the threat of communism to free institutions will be given considerable weight. Under this approach, if a congressional committee prudently informs the witness of the subject matter under inquiry and does not engage in wide-ranging inquiries concerning ideas, politics, religion, and so on, any investigation of communist subversion will probably be sustained. The overall effect of the *Watkins* and *Barenblatt* cases appears to be that Congress will be required to delegate investigative power with somewhat greater care; that commitee chairmen will be required to clarify the pertinency of particular questions to the matter under inquiry; and that the free-wheeling character of many congressional investigations will be reduced but not eliminated. Severe restrictions will not be imposed on the power of congressional investigation itself. Any attempt to do so would risk a pitched battle with the Congress—a contest in which the Congress has the superior weapons.

In the area of state legislative investigations, the 1958 Term of the Supreme Court resulted in both a consolidation of earlier positions and a partial retreat from the advanced ground of the *Sweezy* case. *Scull v. Virginia*[103] extended the due process vagueness point of *Watkins* to state legislative investigations. *Raley v. Ohio*,[104] presenting a novel issue of entrapment, reinforced previous intimations that fairness to witnesses would be required. On the other hand, *Uphaus v. Wyman*[105] had the effect of placing the decision in *Sweezy v. New Hampshire* under a cloud.

Immediately after the *Sweezy* case, it appeared that any role of

103. 359 U.S. 344 (1959). The Ohio Un-American Activities Commission, while questioning witnesses about alleged subversive conduct, led them to believe that they had a right to rely on the state privilege against self-incrimination. Their subsequent contempt convictions for refusals to answer were affirmed by the Ohio Supreme Court on the ground that, under state law, the privilege was unavailable because of a state immunity statute. The Court was unanimous in holding that due process was violated when persons were convicted, after being told that they might properly refuse to answer incriminating questions, for these refusals.

104. 360 U.S. 423 (1959).

105. 360 U.S. 72 (1959).

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the states in dealing with subversion would not be looked upon favorably by the Court. It seemed likely that the reduced operation of state law in this field would make it difficult for a state to justify an investigation which substantially affected first amendment rights. Justices Frankfurter and Harlan had indicated in their concurring opinion in *Sweezy* that a heavy burden rested on the states: they must demonstrate an existing threat to the safety of the state. Since the Chief Justice and Justices Black, Douglas and Brennan appeared to require an even greater justification, if any showing at all would justify an infringement of first amendment rights, state investigations of subversive activity seemed to be substantially limited.

The *Uphaus* case is a startling reversal of form. Uphaus ran a summer camp in New Hampshire at which speakers and guests carried on discussions of political and economic matters. The New Hampshire attorney general, operating under authority of the same statutes involved in the *Sweezy* case, asked Uphaus to produce the names of all persons who attended the camp during two summer seasons and the correspondence which he had carried on with those persons. He based his demand on information that Uphaus, along with some of the speakers, were members of the Communist Party or of organizations cited as subversive or communist controlled on the list of the United States attorney general. The New Hampshire Supreme Court had reaffirmed Uphaus' conviction after the case had been remanded to it for consideration in light of the *Sweezy* case. When the case reached the Supreme Court for the second time, the conviction was affirmed on the ground that New Hampshire's interest in determining the presence of "subversive persons" within the state outweighed Uphaus' interest in associational privacy.The justification for the inquiry was found in the fact that a number of the speakers had either been members of the Communist Party or had connections with organizations listed as subversive, and that the camp, which was operated as a public lodging place, was required by state law to maintain a register of guests. The motives of the attorney general in conducting the investigation were not scrutinized, although the dissenting opinion contained a persuasive argument that exposure was the primary purpose.

In the aftermath of *Uphaus*, the lengthy opinion of Chief Justice Warren in the *Sweezy* case continues to be supported by only four members of the Court. On the other hand, the approach of Mr. Justice Frankfurter, expressed in his concurring opinion in the *Sweezy* case, appears to command a bare majority of the present personnel of the Court. While the balance of the Court is so precarious that prediction is difficult, it would seem that greater respect will be given to state investigations than had seemed probable

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after the *Sweezy* case; that judicial self-restraint in determining constitutional questions is on the increase; that the motives of state or federal legislators in conducting investigations will not be examined by the Court; but that, nevertheless, the Court is extremely sensitive to first amendment rights and will attempt to vindicate them when it feels that legislative inquiries are colored by unfairness or have gone too far. How far is too far remains indeterminable.

III. Limitations on State Power To Impose Civil Disqualifications

The most significant state activity with respect to subversion and loyalty has been the imposition of civil disqualifications on persons and organizations considered subversive. Individuals unable or unwilling to comply with state law requiring the taking of a loyalty oath or the revelation of information deemed relevant to loyalty have been deprived of voting rights, occupational opportunities with both public and private employers, and various other benefits and privileges. The imposition of these civil disqualifications has raised fundamental constitutional issues which increasingly have found their way to the Supreme Court.

It would be idle to pretend that the Court's resolution of these issues has followed a consistent pattern or resulted in a precise package of predictable rules. For the Court, like society at large, has been unguided by prior experience, confused by the complexity of the problems, and influenced by divergent views concerning, on the one hand, the magnitude of the threat posed by communist tactics and, on the other, the effect of the various legislative measures on the climate of freedom which is so vital to a vigorous democracy.

While those who seek certainty should turn their attention to less volatile fields of constitutional law, an increasing degree of clarity can now be provided. More than a decade of experience with the constitutional problems of state loyalty programs has begun to produce a viable body of principle. It is impossible in brief compass to canvass the entire subject,[106] but the doctrinal development in the two major areas of disqualification for public employment and for private employment will be surveyed. In addition, the existence and implications of the claim that the first amendment confers a right to silence will be discussed.

A. Disqualification for public employment

It is unnecessary to pause over the semantic battle as to whether

106. For comprehensive treatment see Brown, Loyalty and Security (1958).

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public employment is a "privilege" or a "right," for nothing should turn on such a barren classification. More intricate distinctions determine constitutional rights. It is clear, on the one hand, that the Constitution does not guarantee public office to anyone. Any governmental body can impose appropriate requirements to secure public employees who are qualified to discharge the manifold tasks of government.[107] On the other hand, the due process clause of the fourteenth amendment prohibits state and local governments from arbitrarily excluding persons from public employment on grounds which have no rational relation to suitability for such employment.[108] Similarly, the equal protection clause forbids a discriminatory classification, unrelated to fitness, which excludes a group of persons from public employment.[109] These principles serve as a foundation for dealing with the issues raised by statutes requiring a noncommunist oath of public employees.

Garner v. Board of Pub. Works,[110] the first of the major decisions, provides a convenient starting point. A 1941 amendment to the Los Angeles charter disqualified for municipal employment all persons declining to take an oath that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives. This charter amendment was implemented in 1948 by an ordinance requiring all city employees (1) to execute an affidavit "'stating whether or not he is or ever was a member of the Communist Party,'"[111] and (2) to take an oath that at present or within the five preceding years they had not advocated the overthrow of the government by unlawful means or belonged to organizations with such objectives. Two municipal employees took the oath but refused to execute the affidavit; thirteen others refused to do either. After being discharged for these refusals, they brought an action in a state court for reinstatement and unpaid salaries. The state court denied relief,[112] and the Supreme Court affirmed.[113]

The Court treated the affidavit and the oath as raising distinct issues. The issue raised by the affidavit was simply whether a city might require its employees to disclose membership in the Communist Party. Seven members of the Court thought the answer clear.[114]

107. Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Hawker v. New York, 170 U.S. 189 (1898); Dent v. West Virginia, 129 U.S. 114 (1889).

108. Douglas v. Noble, 261 U.S. 165, 168 (1923); Dent v. West Virginia, 129 U.S. 114, 123–28 (1889); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319–20 (1867).

109. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

110. 341 U.S. 716 (1951).

111. *Id.* at 719.

112. Garner v. Board of Pub. Works, 98 Cal. App. 2d 493, 220 P.2d 958 (Dist. Ct. App. 1950).

113. Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

114. Only Justices Black and Douglas dissented with respect to the affidavit.

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Public employees could be required to disclose any matter relevant to a determination of present fitness and suitability for public service. In the context of the 1950's, membership in the Communist Party was relevant "to effective and dependable government, and to the confidence of the electorate in its government."[115] Government need not place its trust in persons dedicated to overthrow the government by force and violence. The Court emphasized, however, that since the dismissals of the two employees who refused to execute the affidavit rested on their refusals to supply relevant information, no question was presented as to whether a discharge might be based on information in an affidavit, such as an admission of past membership in the Communist Party.[116]

A bare majority of the Court justified the oath on somewhat different grounds.[117] The 1941 charter amendment was said to deny city employment to any persons who thereafter should fail to comply with its requirements of loyalty. The oath did not have a retrospective operation because it implemented the charter amendment, imposing the identical standard in the form of an oath covering the period 1945–1948. Nor was it invalid as a bill of attainder since it did not inflict punishment, but "merely provide[d] standards of qualification and eligibility for employment."[118] A contention that the oath violated the due process clause because it was not limited to knowing membership in the proscribed organizations was avoided by an adroit rewriting of the municipal ordinance. The ordinance did not in terms require *scienter*; nevertheless the Court assumed that *scienter* was implicit in each clause of the oath. Mr. Justice Frankfurter, believing that it was improper for the Court to imply such a requirement in the absence of a state court interpretation, dissented from this portion of the *Garner* case. Justices Black, Douglas and Burton also dissented from the Court's validation of the oath, arguing that it was invalid as a bill of attainder since it operated retrospectively as a perpetual bar to employees who had held certain views at any time since a date five years preceding the effective date of the ordinance.

The *Garner* case, therefore, is a square holding that present or recent membership in the Communist Party or any other organization with illegal objectives is relevant to the fitness of persons for

They thought the case in all its aspects was controlled by Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), and *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), in which test oaths directed against adherents of the confederate cause were struck down as bills of attainder and ex post facto laws.

115. 341 U.S. at 725 (separate opinion).

116. *Id.* at 720, 730.

117. Justices Frankfurter and Burton, in addition to Justices Black and Douglas, dissented from this portion of the case.

118. 341 U.S. at 722.

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public employment, and that a refusal to supply information relating to such membership or to take an oath of nonmembership is ground for discharge from public employment. A necessary presupposition of this holding is that "no unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor."[119]

Gerende v. Board of Supervisors[120] and *Adler v. Board of Education*[121] applied similar principles to related situations. The *Gerende* case indicated that eligibility for elective office could be conditioned on the execution of a loyalty oath negating knowing membership in organizations engaged in an attempt to overthrow the government by force and violence. The *Adler* case, validating an involved statutory scheme which sought to bar from employment in the public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means, is a less satisfactory precedent. The Court's opinion appears to rely heavily on the "privilege" concept and contains broad language which the Court certainly no longer accepts.[122] Secondly, as Mr. Justice Frankfurter pointed out in his dissenting opinion, the Court upheld the statutory scheme before it had been applied against any individuals or interpreted by the state courts, thus violating the Court's self-imposed jurisdictional limitations of standing and ripeness.

Each of these cases contained strong intimations that a loyalty oath or other procedure which disqualified individuals on the basis of innocent membership in the Communist Party would be invalid.[123] *Wieman v. Updegraff*[124] fulfilled these intimations by holding that "indiscriminate classification of innocent with knowing activity" is an "assertion of arbitrary power" which violates the due process clause of the fourteenth amendment.[125] An Oklahoma stat-

119. *Id.* at 725 (concurring opinion).
120. 341 U.S. 56 (1951).
121. 342 U.S. 485 (1952).
122. [Persons employed or seeking employment in the public schools] have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

Id. at 492. *Cf.* Schware v. Board of Bar Examiners, 353 U.S. 232, 238–39 (1957); Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952).
123. Adler v. Board of Educ., 342 U.S. 485, 494 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 723–24 (1951); Gerende v. Board of Supervisors, 341 U.S. 56–57 (1951).
124. 344 U.S. 183 (1952).
125. *Id.* at 191.

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ute required state officers and employees to take a loyalty oath that they were not and for five years immediately preceding the taking of the oath had not been affiliated with or members of organizations on the Attorney General's list of subversive organizations. The Court interpreted state court decisions involving the oath as construing it so as to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organization. The innocent member thus received the same treatment as the member aware of illegal purposes. The Court was unanimous in holding that membership in organizations advocating overthrow of government, if it is to be the ground for disqualification from public employment, must be a *knowing* membership.

The *Wieman* case was a harbinger of the future in several respects. Concurring opinions of Mr. Justice Black and Mr. Justice Frankfurter, joined by Mr. Justice Douglas, emphasized that the loyalty oath was being applied to teachers and expressed their views that freedom of expression was imperiled by loyalty oaths and that any such impact on the educational system should be subjected to close scruitiny. That three members of the Court should express themselves so strongly indicated, as the *Sweezy* case [126] tended to prove, that academic freedom will be given first amendment protection against impairment by state authorities. Perhaps even more important is the Court's unanimous view that eligibility for public employment can be conditioned only on requirements which have a rational relationship to fitness. The Court is thus committed to a review and assessment of state-imposed limitations on public employment. The extension of this requirement to state-imposed limitations on private employment in *Schware v. Board of Bar Examiners*[127] should not have been surprising.

B. Disqualification for private employment

In earlier days of occupational licensing, the Supreme Court reviewed state limitations which restricted occupational choice with an erratic but recurring zeal.[128] The right of a citizen "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by

126. Sweezy v. New Hampshire, 354 U.S. 234 (1957); see discussion accompanying notes 192–97 *infra*.

127. 353 U.S. 232 (1957).

128. For example *compare* Adams v. Tanner, 244 U.S. 590 (1917) (invalidating state law absolutely prohibiting private employment agencies), *with* Brazee v. Michigan, 241 U.S. 340 (1916) (upholding state law imposing license fees on private employment agencies and prohibiting them from sending applicants to an employer who had not applied for labor).

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any lawful calling. . . . "[129] were among the rights protected against state action by the due process clause of the fourteenth amendment. But even in these earlier days of judicial activism in the review of state economic legislation, it was unquestioned that the states, in order to protect the public, could impose reasonable restraints on a citizen's freedom to choose his work.[130] One facet of the "constitutional renaissance" which followed the creation of a New Deal majority on the Court was the virtual abdication by the Court of judicial review of state licensing statutes.[131] The states, it was said, could regulate any occupation provided the regulation had some reasonable basis in a public interest. Since a tenable argument can be made in almost any case that the public health, welfare, safety, or morals is adversely affected by "unfit" persons engaging in the restricted work or by "unfair practices" which the regulation aims to prevent, few occupational licensing statutes have been subjected to successful constitutional attack. The Court's application of a presumption that conditions exist which support the legislative judgment,[132] and its refusal to inquire into legislative motives, have limited the scope of review to such a point that regulatory schemes involving seemingly invidious discriminations have been upheld.[133]

129. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

130. Hawker v. New York, 170 U.S. 189 (1898) (upholding, 6–3, a state law excluding persons convicted of a felony from the practice of medicine); Dent v. West Virginia, 129 U.S. 114 (1889) (upholding a state law restricting the practice of medicine to those satisfying state board of their qualifications).

131. See, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In upholding an Oklahoma statute which (1) made it unlawful for any person not a licensed optometrist or ophthamologist to fit lenses to the face or to duplicate or replace lenses, except upon the written prescription of an Oklahoma-licensed optometrist or ophthamologist; (2) subjected opticians to this regulatory system while exempting all sellers of ready-to-wear glasses; (3) forbade the use of the premises of retail stores by opticians; and (4) prohibited all advertising, the Court said:

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. at 487–88.

132. *E.g.*, In Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931), the Court stated that:

> [Since the legislation] deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. . . . We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

Id. at 158–59.

133. *E.g.*, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949) (upholding a state statute forbidding life insurance companies and their agents from operating

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Unless *Schware v. Board of Bar Examiners*[134] is based solely on the fact that a former Communist was involved, it would seem to indicate that the Court may re-enter the occupational licensing field and strike down licensing requirements which have little or no rational relation to fitness for the occupation in question.

Schware, after graduating from law school, petitioned the New Mexico Board of Bar Examiners for permission to take the 1954 bar examination. The Board, after a hearing, denied permission on the ground that he had failed to show the good moral character required by statute of applicants to the bar. The New Mexico Supreme Court affirmed the denial,[135] and the Supreme Court, in an opinion by Mr. Justice Black, reversed.[136] The Court concluded that the denial offended due process because there was no evidence which rationally justified the state's finding that Schware was morally unqualified for the practice of law. Mr. Justice Frankfurter, joined by Justices Clark and Harlan, concurred on the ground that the state court was unwarranted in concluding that Schware's past communist affiliation made him "a person of questionable character."

The *Schware* case is significant in several respects. First, as noted above, it indicates that freedom of occupational choice is an important freedom which is protected by the due process clause. The *Wieman* case[137] established that public employment was not a "privilege" which could be denied for any reason whatsoever. Now it appears that a similar protection is to be accorded to persons arbitrarily excluded from the occupation of their choice. This is neither an unfortunate nor an inappropriate development. The freedom to choose work of one's choice is surely a most important freedom, whether it be considered as "property" or "liberty." The mushrooming of occupational restrictions in the United States, the increasing tendency to allow regulated groups to control entry into various occupations, and the growing irrelevancy to fitness of many of the requirements that are imposed combine to greatly restrict occupational freedom.[138] Perhaps it is time for the multiplying re-

an undertaking business and forbidding undertakers from serving as life insurance agents; only one insurance company in the state operated on the basis of using undertakers as its agents); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (upholding, 5–4, a Louisiana river pilotage law under which incumbent pilots had an unfettered discretion to select their successors, a discretion actually exercised by choosing friends and relatives of the pilots).

134. 353 U.S. 232 (1957).

135. Schware v. Board of Bar Examiners, 60 N.M. 304, 291 P.2d 607 (1955).

136. Schware v. Board of Bar Examiners, 353 U.S. 232. Mr. Justice Whittaker did not participate.

137. Wieman v. Updegraff, 344 U.S. 183 (1952).

138. See generally GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105–51 (1956).

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strictions on occupational choice to be subjected to the basic requirements of decency and rationality emanating from the due process clause of the fourteenth amendment.

The willingness, however, of the majority of the Court in the *Schware* case to undertake an independent determination of the facts presents larger difficulties. The case did not involve a legislative preclusion of a class of persons, as in *Wieman*, but a factual determination that a particular individual did not meet an accepted standard—good moral character. The New Mexico bar examiners and the New Mexico Supreme Court had based their conclusion that Schware had failed to show good moral character on Schware's use of aliases, his record of arrests, and his past membership in the Communist Party. The Court considered each of these factors in detail and rejected each as rationally justifying the finding.

Schware had used aliases between 1933 and 1937 in order to obtain work and to further his efforts as a labor organizer; his arrests on various charges had been adequately explained and in each instance the charges had been dropped; and he had been a member of the Communist Party from 1932 to 1940, but had had no connection with communist activities since that time. The Court concluded that the use of aliases for a lawful purpose did not reflect on moral character; that arrests without convictions were of slight probative value; and that membership in the Communist Party during a period when it was a lawful political party, absent any showing that Schware was aware of possible illegal purposes or participated in illegal acts, could not serve as the basis for a finding of bad moral character, especially when the persuasive evidence of present good character in the record was taken into account.

The air of reasonableness pervading the Court's opinion obscures the fact that the Court made an independent assessment of the facts on the basis of a reading of the record and rejected the demeanor evidence relied on by the trier of fact. Such a relatively broad scope of review has hitherto been confined largely to coerced confession cases.[139] The Court may feel that when such issues are involved, public pressure and prejudice against minority groups combine to decrease the ability of state courts to determine the facts fairly. And the Court may have a similar fear when communists are involved.

139. For three recent instances see Payne v. Arkansas, 356 U.S. 560 (1958); Moore v. Michigan, 355 U.S. 155 (1957); Fikes v. Alabama, 352 U.S. 191 (1957); *cf.* Stein v. New York, 346 U.S. 156, 181 (1953); Lisenba v. California, 314 U.S. 219 (1941). See also Berman, *Supreme Court Review of State Court "Findings of Fact" in Certain Criminal Cases: The Fact-Law Dichotomy in a Narrow Area*, 23 So. CAL. L. REV. 334 (1950).

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Of course, the absence of any evidence in a record to support an essential finding of fact is itself a question of law. A finding without a rational basis is an arbitrary and lawless finding, and subject to attack as such under the due process clause. Whenever constitutional issues are presented, the Court, in order to preserve its own authority as the ultimate arbiter of such issues, must retain the power to look beyond the findings of the state court. But situations calling for the exercise of this power should be rare. In the vast majority of cases coming from state courts, the Court should and does give deference to and follow the findings of fact of the state court.[140]

It is doubtful that the *Schware* case is one of those extraordinary cases in which the Court should look beyond the factual determinations of the state court. Demeanor evidence should play an important part in determinations of moral character. The bar examiners, as the triers of fact, were free to reject some or all of Schware's self-serving testimony. It is for these reasons that the concurring opinion of Mr. Justice Frankfurter, joined by Justices Clark and Harlan, is sounder in principle.

Mr. Justice Frankfurter read the opinion of the state court as based primarily on its belief that "' one who has knowingly given his loyalties to such a program and belief [communism] for six to seven years during a period of responsible adulthood is a person of questionable character.'"[141] To draw an inference of present unsuitability from the fact that a person had been a member of the Communist Party fifteen years before, at a time when such membership was not only lawful but fashionable, was "so dogmatic an inference as to be wholly unwarranted."[142] Although it was beyond the function of the Court "to act as overseer of a particular result of the procedure established by a particular State for admission to its bar,"[143] what the state had done, in effect, was to create an irrebutable presumption of bad moral character from the fact of past Communist Party membership. This the due process clause prohibited.

C. A right to silence?

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures is not a hardened Communist but a loyal

140. See, *e.g.*, Stein v. New York, 346 U.S. 156, 181 (1953); Brown v. Allen, 344 U.S. 443 (1953).

141. 353 U.S. at 250 (quoting from the state court's opinion).

142. *Id.* at 251.

143. *Id.* at 248.

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citizen with conscientious scruples.[144] Although this observation is incapable of proof, it does seem likely that the net cast for subversives has brought forth many innocent fish. Of course, if the security measure invades the privacy of the conscience, the first amendment may allow the individual to remain silent.[145] Religious inquiries are the most obvious case, but similar protection may be accorded to political beliefs and to academic discussion. The *Sweezy* case [146] indicates that inquiries concerning lawful political activities such as those of the Progressive Party in 1948 and intellectual exchange such as the academic discussion of socialism will be restricted. Even where the first amendment provides no protection, the requirement that membership or conduct have taken place with knowledge of unlawful purposes tends to protect the innocent.[147] Substantial disqualifications cannot be predicated on mere guilt by association. But these approaches may still be insufficient to protect the sincere individual who refuses on principle to take an oath, sign an affidavit, or cooperate in what he feels is an unjust and unlawful inquiry.[148] The impact of security measures on the conscientious objector thus raises the complex issue of whether there is a right to silence.

The problem has several dimensions. First, does the Constitution entitle the conscientious objector to special treatment? On principle, the answer seems clear. If the state has not invaded the area protected by the first amendment, and the measure in its general application meets the requirements of the due process clause, the individual who objects to it on grounds of conscience is entitled to no more consideration than is received by those persons the legislature sought to penalize. Second, there is the problem of what inferences may be drawn from a refusal to cooperate. Most security measures do not contain specific provisions for the noncooperative individual, and the usual device has been to infer misconduct from a refusal to answer relevant questions and even from a claim of the privilege against self-incrimination. Is this permissible? Finally, there is the

144. GELLHORN, THE STATES AND SUBVERSION, 367–68 (1952); Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. PA. L. REV. 480, 482 n.5 (1953).

145. See the discussion at notes 172–97 *infra*.

146. Sweezy v. New Hampshire, 354 U.S. 234 (1957). See text accompanying notes 85–97 *supra*.

147. See text accompanying and following note 137 *supra*.

148. Some states have taken the position that a refusal to answer questions concerning communist activity warrants discharge even though the other evidence in the record convinces the trier of fact that the person is loyal. Fitzgerald v. Philadelphia, 376 Pa. 379, 102 A.2d 887 (1954) (dismissal of nurse for refusal to take Pennsylvania's Pechan Act oath even though conceded to be "utterly opposed to Communism and is in all respects loyal to the principles of our government"); Pickus v. Board of Educ., 9 Ill. 2d 559, 138 N.E. 2d 532 (1956) (dismissal without hearing justified when teacher refused to take loyalty oath). *Contra*, Board of Educ. v. Mass, 47 Cal. 2d 494, 304 P.2d 1015 (1956).

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problem of identifying the individual who is acting in good faith. If security measures were drafted in such a fashion that a good faith exercise of conscience would except an individual from their application, this issue would be determined by state agencies in the same manner as other factual issues. But existing security measures fail to make specific provision for the stubborn man of principle. Yet there may be a judicial desire to exempt such an individual from the general operation of loyalty tests. Important issues of judicial review are raised when the Supreme Court makes independent factual determinations of such ambiguous matters as "good faith" or "good moral character."

The Court has not yet had a full opportunity to explore all of these questions. Moreover, in those cases in which the questions have arisen the Court has been bitterly divided. The absence of a stable majority and recent changes in the personnel of the Court make it likely that further change will take place. A survey of existing cases, however, may assist in isolating relevant factors and thus provide an aid to predictability.

Questions involving the impact of governmental programs on the individual who has refrained on moral or religious grounds from complying with statutory requirements have often been before the Court. The refusal to bear arms, for example, has been punished by denial of citizenship,[149] denial of admission to the bar,[150] and imprisonment.[151] Religious scruples, it has recently been held, are not a defense to a charge of willful disobedience of an air raid drill.[152] But the Constitution may protect the nonconformist when the governmental program does not represent a public interest to which the Court assigns substantial value. Mr. Justice Jackson, speaking for the Court in the second *Flag Salute Case*, [153] stated broadly that the first amendment rendered a state powerless to compel the affirmance of a belief—even the symbolic act of saluting the United States flag.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to con-

149. The Supreme Court held prior to 1946 that an alien who refused to bear arms would not be admitted to citizenship. United States v. Bland, 283 U.S. 636 (1931); United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929). In Girouard v. United States, 328 U.S. 61 (1946), the earlier decisions were overruled.

150. *In re* Summers, 325 U.S. 561 (1945).

151. Estep v. United States, 327 U.S. 114 (1946); United States v. Kime, 188 F.2d 677 (7th Cir. 1951); Richter v. United States, 181 F.2d 591 (9th Cir. 1950).

152. People v. Parilli, 1 Misc. 2d 201, 147 N.Y.S.2d 618 (Magis. Ct. 1955).

153. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

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> fess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[154]

Phrases of a similar nature may be found here and there in the *United States Reports*, but usually as dicta not bearing the same authority. During the early 1940's the Supreme Court was not receptive, in general, to arguments predicated on considerations of national unity. Only in the midst of the wartime crisis and the post-war alarm did the Constitution, in the view of a majority of the Court, find room for governmental coercion premised on an overriding need for national security.[155] Absolutist pronouncements concerning the ambit of first amendment freedoms gave way to more flexible doctrine. Thus it was that the Court proved unreceptive when a right to silence, usually said to emanate from the first amendment, was urged in the earlier of the current series of cases involving the application of loyalty tests to the recalcitrant witness.[156] More recent cases, however, have appeared to give an uncertain degree of protection to this first amendment "liberty of silence."

The first case bearing on the existence and dimensions of a "right to silence"—in this instance based on the due process clause—was *Slochower v. Board of Educ.*,[157] involving the discharge of a public school teacher following his claim of the privilege against self-incrimination before a congressional committee. The Court held, 5–4, that a discharge predicated on the invocation of the fifth amendment before a congressional committee violated the due process clause. The majority opinion roundly condemns any imputation of guilt based on the use of the fifth amendment, and contains broad language to the effect that the due process clause protects any invocation of a constitutional right. Although the language

154. 319 U.S. at 642.

155. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Korematsu v. United States, 323 U.S. 214 (1944); Hirbayashi v. United States, 320 U.S. 81 (1943).

156. *In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826, *appeal dismissed and cert. denied*, 348 U.S. 946 (1954); *In re* Summers, 325 U.S. 561 (1945).

The *Anastaplo* case, seemingly a clear case of a refusal to cooperate on grounds of conscience, is discussed in London, *Heresy and the Illinois Bar: The Application of George Anastaplo for Admission*, 12 Law. Guild Rev. 163 (1952); Note, *The Illinois Bar and Individual Freedom*, 50 Nw.U. L. Rev. 94 (1955).

The *Summers* case involved a bar applicant who held pacifist views concerning the use of force. The Supreme Court affirmed, 5–4, an Illinois decision denying his admission on the sole ground that his religious views prevented him from swearing in good faith to uphold the Constitution of Illinois, which contained a provision requiring service in the state militia in time of war. The overruling of United States v. Macintosh, 283 U.S. 605 (1931), and United States v. Schwimmer, 279 U.S. 644 (1929), both of which were relied on in *Summers*, by Girouard v. United States, 328 U.S. 61 (1946), undermined the authority of the *Summers* case.

157. 350 U.S. 551 (1956).

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of the opinion suggested that a good faith refusal on constitutional grounds to answer questions would be protected, the holding of the case would appear to be more narrowly confined to its peculiar facts.

Slochower, a professor with long experience and good record at Brooklyn College, was suspended shortly after he had invoked the fifth amendment before a Senate subcommittee. Section 903 of the New York City charter made his dismissal automatic. Since the Senate inquiry at which Slochower invoked the privilege was not directed to his fitness to hold a teaching position and the state had not asked him for an explanation for his use of the privilege, the Court was able to interpret the state action as based on an automatic inference of guilt arising from the exercise of the constitutional privilege.[158] Thus the case did not decide that a state cannot discharge an employee for refusal to answer inquiries relevant to his fitness directed to him by state officials.[159] Nor did it decide that a state cannot draw an inference from a failure of a state employee to adequately explain the use of the privilege. It held merely that due process forbids the arbitrary conclusion of guilt from the proper claim of the privilege against self-incrimination in a federal proceeding.

About a year later, when the Supreme Court decided *Konigsberg v. State Bar*, [160] it appeared that the dicta of the *Slochower* opinion had become constitutional doctrine. Konigsberg had been denied admission to the California bar on the grounds that he had failed to prove (1) that he did not advocate overthrow of the government of the United States or of California by unconstitutional means, and (2) that he was of good moral character. The record, which contained testimonials from forty-two persons as to Konigsberg's good character, also contained testimony that Konigsberg had attended Communist Party meetings in 1941 and had written a vitriolic series of articles criticizing public officials and their policies. Konigsberg answered the direct question, "Do you advocate overthrow of the government of the United States or of this State by force or violence or other unconstitutional means?" in the negative, but refused on first amendment grounds to answer any other questions relating to his political beliefs and associations. The California Supreme Court declined to review Konigsberg's petition, without opinion,[161] and, on certiorari, the Supreme Court reversed.

158. The dissenters, Justices Reed, Burton, Minton and Harlan, disputed this interpretation of the New York City charter.

159. 350 U.S. at 558–59.

160. 353 U.S. 252 (1957). Mr. Justice Whittaker did not participate.

161. *Id.* at 254.

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Mr. Justice Black, speaking for a majority of five, reviewed the record in detail, as he had done in *Schware*, and concluded that there was no evidence rationally justifying the findings of the bar examiners. Mr. Justice Frankfurter dissented on jurisdictional grounds, urging that the case should be remanded to the state court for a certification of the grounds of its declination to review. Mr. Justice Harlan, joined by Mr. Justice Clark, dissented both on the jurisdictional issue and on the merits.

The majority opinion of Mr. Justice Black comes very close to holding that a state cannot draw unfavorable inferences from a mistaken but honest refusal to answer relevant questions. While intimating that it would be unconstitutional for admission to the bar to be denied solely on the basis of a good faith refusal to answer, decision of this issue was avoided with the explanation that California had not based the denial on this ground. Yet this was done only by ignoring the insistence placed on this matter by the bar examiners and by finding, contrary to the implied finding of the state, that the refusal to cooperate was in "good faith." Although the majority did not question the state rule that the applicant has the burden of proving his fitness, the decision must be interpreted either as ignoring the burden of proof or as holding that the applicant satisfies the burden by introducing testimonial letters with respect to good moral character. In either event, the state is required to produce affirmative evidence of present lack of moral character in order to deny admission, and the lack of such evidence deprives the finding of any rational basis and thus offends due process. The applicant's refusal to cooperate, in this view, can be given little or no significance.

Mr. Justice Harlan's dissenting opinion[162] demonstrates in convincing fashion that the majority misconceived the question at issue. The majority stated the issue as being whether the record contained evidence establishing that Konigsberg had a bad moral character. His refusal to answer any questions, other than the general query whether he advocated overthrow of government by unconstitutional means, was treated as raising an entirely separate question, and, since the state had not rested its denial of admission *solely* on that ground, was given no significance whatsoever. Mr. Justice Harlan's detailed analysis of the record, however, leaves little doubt that Konigsberg's refusal to supply the bar examiners with the information they needed to make a determination with respect to his moral character was a crucial element in the examiners' decision that Konigsberg had not carried his burden of proof.

162. *Id.* at 276–312.

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The implications of the *Konigsberg* case for the technique of judicial review would be somewhat alarming if it were not for the fact that subsequent decisions have greatly reduced its significance.[163] As things now stand, the case evidences a willingness on the part of some members of the Court to make independent factual determinations from a printed record of such delicate matters as whether a person's refusal to answer questions was honest even though mistaken. For the *Konigsberg* majority seems to be saying that if an individual's refusal to cooperate is found—by a majority of the Supreme Court—to be in good faith, and the record does not contain other evidence which in itself warrants the result reached by the state, the action of the state must be set aside.[164] Thus *Konigsberg* is a much more far-reaching holding than *Schware*,[165] which holds only that a state cannot disqualify a person from engaging in the occupation of his choice unless the basis for disqualification has a rational relation to unfitness for the occupation.

The vicissitudes during the Supreme Court's 1957 term of the

163. See the discussion of the *Beilan* case note 166 *infra* and the *Lerner* case note 169 *infra*.

164. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted.
353 U.S. at 270–71.

165. Schware v. Board of Examiners, 353 U.S. 232 (1957). It is doubtful that either case will significantly reduce state control over admission to the bar. Consider, for example, the later history of those applications for admission in which the Supreme Court has become involved: (1) *Anastaplo* obtained a rehearing of his application following the *Konigsberg* and *Schware* decisions. After lengthy hearings, the Illinois Committee on Character and Fitness, by a vote of 11–6, again concluded that the application should be denied because of Anastaplo's continued refusal to answer questions concerning membership in the Communist Party. It did so even though it conceded that Anastaplo's loyalty and good faith were unquestioned. An appeal to the Illinois Supreme Court is now pending. (2) *Konigsberg* again refused to answer questions concerning past or present membership in the Communist Party after his case was remanded. The California Bar Examiners again rejected his application, this time on the specific ground of failure to answer relevant questions. His appeal is pending in the California Supreme Court. (3) *Patterson's* denial of admission by the Oregon Supreme Court was reversed and remanded for reconsideration in light of the *Konigsberg* and *Schware* decisions. Application of Patterson, 210 Ore. 495, 302 P.2d 227, *rev'd*, 353 U.S. 952 (1957). On remand, the Oregon Supreme Court reaffirmed its original opinion, relying on the fact that Patterson had been a member of the Communist Party from 1946 to 1949 and must have been aware of its unlawful objectives. 213 Ore. 398, 318 P.2d 907 (1957). The Supreme Court then denied certiorari. 356 U.S. 947 (1958). (4) *Schware* apparently tired of the long vigil and did not press his application after the Supreme Court decision in his favor.

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right to silence which the *Konigsberg* case appeared to recognize demonstrated once again the particularity with which constitutional development takes place. In *Beilan v. Board of Pub. Educ.*,[166] a public school teacher was discharged for "incompetency" after many years of satisfactory service because of a 1953 refusal to answer any questions put to him by his superior which related to past membership in communist groups. The issue seemingly decided by *Konigsberg* was cleanly posed: May a state discharge a person solely on the basis of a refusal to answer relevant questions, or is it necessary that there be other affirmative evidence of unfitness? A differently constituted majority found the answer almost self-evident—it was permissible for a state to draw an inference of unfitness or lack of dependability from a refusal to answer relevant questions.

The *Beilan* and *Konigsberg* cases seem to be incompatible in principle as well as spirit.[167] The Court's opinion in *Beilan* attempted to distinguish *Konigsberg* by stating that the action of the state in *Konigsberg* "was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal," whereas in *Beilan* "no inferences at all were drawn from petitioner's refusal to answer."[168] The refusal itself operated to effectuate the discharge. This attempted distinction fails to penetrate beneath the surface of either case, treating one as wholly a refusal-to-answer case and the other as an impermissible-inference case. Categorization as one or the other appears to depend on nothing more than the verbal choices made by the state court. Thus *Konigsberg*, although it remains as a case which a future Court may build on, is reduced in import because its application may be so easily avoided.

Lerner v. Casey,[169] a companion case to *Beilan*, dealt more directly with the inference that can permissibly be drawn from the

166. 357 U.S. 399 (1958).

167. It is significant that the three dissenters in *Konigsberg* were in the majority in *Beilan*, along with Mr. Justice Burton (who was also in the majority in *Konigsberg*) and Mr. Justice Whittaker (who did not participate in *Konigsberg*). The four dissenting justices in *Beilan* were all in the majority in *Konigsberg*. Since it is likely that Justices Black and Douglas, and perhaps the Chief Justice as well, would have preferred to take a more extreme position in *Konigsberg*, holding that questions concerning political affiliation and belief are barred by the first amendment or are irrelevant to fitness, it seems safe to assume that the more moderate position was taken only to gain a majority for reversal. Since Mr. Justice Burton was the only member of the Court who was in the majority in both cases, and his vote was essential to each, it is possible that the cases represent his views. If so, his retirement and the appointment of Mr. Justice Stewart may reopen the entire matter.

168. 357 U.S. at 409.

169. 357 U.S. 468 (1958).

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use of the privilege against self-incrimination.[170] Lerner, a New York City subway conductor, was discharged by the Transit Authority because of the doubt created as to his "reliability" by his claim of the privilege against self-incrimination when asked by city officials concerning current membership in the Communist Party. The Court held, again 5–4, that the inference of unreliability was permissible.[171] The *Slochower* case was distinguished on the valid grounds that Lerner had been questioned by state rather than federal officers; that these officers had authority to ask questions relating to subversive activity in connection with fitness for employment; and that the state had not made an inference of disloyalty from use of the privilege, but only of "unreliability." The Court also emphasized that the fifth amendment privilege was not available to Lerner in a state investigation, and hence the state had as much right to discharge him for failure to answer as it would have had in the absence of a claim of privilege.

It should be noted that the questions put to Lerner related to *current* rather than past membership in the Communist Party. If a refusal to answer under such circumstances had not been treated as permitting an inference of unfitness, the Court would have traveled full circle, and the power of the states to exact information relating to subversive activity from its employees, established in the *Garner* case, would have become completely illusory.

While these decisions were rejecting, by narrow majorities, the claim of a constitutional right of silence, other Supreme Court decisions were creating such rights in wholesale fashion in somewhat different contexts. *NAACP v. Alabama ex rel. Patterson*, [172] arising on peculiar facts, involves probably the most far-reaching holding. The NAACP, a New York corporation, had failed to reg-

170. Beilan, like Slochower, had invoked the fifth amendment privilege before a congressional committee, but unlike Slochower, Beilan was purportedly dismissed for failing to answer questions of a superior. Mr. Chief Justice Warren in his dissenting opinion in *Beilan* argued that from a realistic standpoint the case was indistinguishable from *Slochower*, since Beilan's dismissal took place only five days after he had claimed the privilege before a congressional committee while his refusal to answer his superiors occurred some thirteen months before.

The principal factual differences between *Lerner* and *Beilan* are (1) that the former, but not the latter, relied on fifth amendment grounds in refusing to answer his superiors; and (2) that Lerner was dismissed as a "security risk" while Beilan was dismissed for "incompetency."

171. The Chief Justice and Justices Black, Douglas, and Brennan dissented in three separate opinions. Mr. Justice Brennan's dissent argued that Pennsylvania in *Beilan* and New York in *Lerner* had publicly labeled the respective petitioners as disloyal Americans and that, if they were to be discharged under security statutes, it should be through a procedure which avoided this stigma. Factually, this argument seems stronger in *Lerner* than in *Beilan*. Mr. Justice Frankfurter's separate concurrence in both cases appears to be a reply to this argument.

172. 357 U.S. 449 (1958).

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ister under an Alabama statute requiring registration of foreign corporations doing business in the state. In a proceeding brought by the state to oust the NAACP from Alabama for failure to comply, the NAACP was found in civil contempt and heavily fined for failing to comply with an order granting the state's motion for production by the NAACP of certain records, including its Alabama membership lists. Ostensibly the state desired this information in order to rebut the NAACP's claim, later abandoned, that it was not doing business in the state for purposes of the statute. The Supreme Court held that the state could not require the divulgence of the membership lists, since it had not demonstrated any compelling justification for compulsory disclosure.

The preliminary questions of jurisdiction[173] and standing[174] need not detain us, but the merits of the constitutional issue deserve passing comment.[175] Mr. Justice Harlan's opinion for a unanimous Court proceeded step-by-step to its inexorable conclusion. First, freedom of association—protected from state abridgment by the due process clause of the fourteenth amendment—required that the state action be scrutinized with care. Second, since divulgence of membership would result in community pressures and reprisals, compulsory disclosure would violate the rights of NAACP members to freely associate in pursuit of their common beliefs. Third, Alabama had no substantial interest in obtaining the membership lists. This last conclusion was based on the fact that the NAACP had supplied sufficient information so that the state could determine the applicability of its foreign-corporation statute—the legal issue to which the production order was directed.[176]

173. When the NAACP sought to stay the contempt judgment, the Alabama Supreme Court denied the application, stating that certiorari was the proper remedy. When certiorari was then brought, the Alabama Supreme Court held that mandamus was the proper remedy, and, alas, it was too late to file a petition for mandamus. *Ex parte* NAACP, 265 Ala. 349, 91 So. 2d 214 (1956). The Supreme Court held that this was not an adequate state ground and hence it had jurisdiction, stating that "novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S. at 457–58.

174. The Court granted the NAACP standing to assert the constitutional rights of its members. The members could assert the right to nondisclosure only by revealing their membership; and there was a reasonable likelihood of substantial injury to the organization. A similar standing question is discussed in several of the opinions in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

175. The constitutional issues are discussed in Robison, *Protection of Associations From Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614 (1958); Note, *State Control Over Political Organizations: First Amendment Checks on Powers of Regulation*, 66 YALE L.J. 545 (1957).

176. The Supreme Court may have difficulty enforcing its mandate. On remand, the Supreme Court of Alabama reaffirmed the contempt judgment on the ground

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The *NAACP* case indicates that the Court is willing, at least in the context of an organization seeking to uphold the rights of Negroes, to protect group rights of association from the interplay of repressive private attitudes and state action compelling identification of the organization's members. And the right to prevent disclosure will not be overridden by an argument that the information is relevant to the determination of a question in which the state has a proper interest. The state must achieve its legitimate purposes by the method having the least impact on first amendment rights[177]—in this case, from other information supplied by the NAACP.

The grounds on which the Court distinguished *New York ex rel. Bryant v. Zimmerman*[178] suggest the limitations which will be placed on the *NAACP* case. In *Bryant*, a New York anti-Klan statute had been upheld against the claim that compulsory disclosure of members violated freedom of assembly. This holding was distinguished in two ways: the Klan, unlike the NAACP, had failed to file any information with the New York authorities, and the New York legislation was based on the fact that the Klan had engaged in acts of unlawful intimidation and violence. But is a legislative judgment that an organization has engaged in unlawful acts sufficient to allow regulation of the organization by the technique of disclosure? If so, allegations of unlawful barratry, champerty, and maintenance would seem to justify regulation of the NAACP. In the background, of course, is the attempt of the Court to enforce its decisions in the *School Segregation Cases*.[179] Judicial notice of social facts, a scanning of legislative motivation, and a more searching review of legislative alternatives may be thought necessary in this context.

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that the NAACP had failed to comply with the order of production in respects other than the membership lists. NAACP v. Alabama ex rel. Patterson, 268 Ala. 531, 109 So. 2d 138. The Supreme Court then granted certiorari for the second time and held that Alabama was precluded from claiming that the NAACP failed to comply with the production order in other respects, since the state had not presented this claim to the Supreme Court. Nor could the Alabama Supreme Court reexamine the grounds on which the Supreme Court had disposed of the case. 360 U.S. 240 (1959). The Court, following its usual practice, withheld the issuance of mandamus on the assumption that the Alabama Supreme Court would enforce the Court's decision.

177. There are many cases in which the Supreme Court has indicated that a state must accomplish its purpose by the method having the least restrictive abridgment of first amendment rights. See Thomas v. Collins, 323 U.S. 516 (1945); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Grosjean v. American Press Co., 297 U.S. 233 (1936). See Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 YALE L.J. 1159, 1173–75 (1956).

178. 278 U.S. 63 (1928).

179. The campaign of many southern states to oust the NAACP and to require

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The Court's decision in *Speiser v. Randall*,[180] involving the constitutionality of a California statute conditioning the grant of a tax exemption on the filing of a loyalty affidavit, confirms the preferred position of first amendment rights and tends to support the right of a private citizen to keep silent concerning his political beliefs and associations — even if they are unlawful ones. California statutes grant real estate tax exemptions to veterans and churches, among others, but require every claimant for an exemption to sign a statement on his tax return declaring that he does not advocate the overthrow of government by unlawful means.[181] The state court, after construing the statutory requirement as extending only to advocacy which would constitute a criminal offense under state or federal law, upheld the denial of tax exemptions to various veterans and churches which refused to sign the loyalty affidavit.[182] Although the taxpayers had based their refusal to answer largely upon first amendment grounds, the Court, in reversing,[183] held that the procedure violated the due process clause in that the oath did not conclusively establish the absence of improper advocacy, but merely imposed upon the taxpayers rather than the state the burden of proving nonadvocacy. Placing the burden on the taxpayers was improper since an adverse determination would amount to a penalty for the exercise of speech.

There can be little quarrel with the ultimate proposition that a

disclosure of its members is summarized in Robison, *supra* note 175, at 614–19. In NAACP v. Patty, 159 F. Supp. 503 (E.D. Va.), *prob. juris. noted sub nom.*, Harrison v. NAACP, 358 U.S. 807 (1958), a three-judge district court held that Virginia statutes aimed at the NAACP were unconstitutional and enjoined their enforcement. The Supreme Court reversed and remanded on the ground that the District Court should have abstained from deciding the constitutional issues until the state courts had a reasonable opportunity to construe the statutes. Harrison v. NAACP, 360 U.S. 167 (1959). The Court also reversed a contempt conviction arising out of a Virginia legislative investigation directed at the NAACP. Scull v. United States, 359 U.S. 344 (1959). See discussion *supra* at note 98. See also NAACP v. Committee on Offenses Against the Administration of Justice, 199 Va. 665, 101 S.E.2d 631, *dismissed as moot*, 358 U.S. 40 (1958).

180. 357 U.S. 513 (1958). A companion case was decided the same day. First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958).

181. CAL. REV. & TAX CODE § 32 (West 1954). The statute implements a provision of the state constitution. CAL. CONST. art. 20, § 19.

182. Speiser v. Randall, 48 Cal. 2d 903, 311 P.2d 546 (1957); First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 311 P.2d 508 (1957).

183. The majority opinion in both cases was by Mr. Justice Brennan, who was joined by Justices Black, Frankfurter, Douglas, Harlan and Whittaker. The Chief Justice did not participate; Mr. Justice Burton concurred in the result; Justices Black and Douglas wrote concurring opinions dealing directly with the first amendment issue; and Mr. Justice Clark, the lone dissenter, objected to the construction given to the state statute by the majority, disagreed with its conclusion that the burden of proof could not be placed on the taxpayers, and argued that in any event such a position should not be taken in a case where the taxpayers had refused to take the oath.

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state may not inflict a penalty without assuming the burden of proof. Several troublesome points, however, must be disposed of before this conclusion may be reached. First, the Court's holding is premised on a dubious interpretation of uncertain California law. The Court assumed that a local tax assessor could deny an exemption if he disbelieved a taxpayer's assertion of nonadvocacy in his tax return; it also assumed that in a subsequent proceeding for a tax refund the taxpayer would bear the burden of proof. The California court had not passed on these questions, and statements in its opinion cast doubt on the Court's interpretation of state law.[184] At best, the ambiguity of state law warranted a remand to the state court for clarification of the statutory procedure.

Second, it is difficult to understand why the taxpayers in this case, who had refused to submit the required affidavits, were entitled to raise the constitutionality of a refund proceeding which would never arise. The taxpayers had not been denied tax exemptions on the ground on which the case was decided—failure to carry the burden of proof in a refund proceeding. They had been denied exemptions because they had refused to submit the required affidavits. The taxpayers had not asserted their nonadvocacy, but had refused to do so; the tax assessor had not been given the opportunity of accepting their assertions; and the burden of proof in some hypothetical future refund proceeding had not been litigated or determined by any California court. It seems doubtful that the taxpayers had standing to raise the constitutionality of the refund procedure on behalf of potential claimants who might never exist. Yet the Court viewed them, in effect, as private attorneys-general entitled to vindicate public rights threatened by requirements inhibiting free speech.[185] Taken in conjunction with other recent decisions, *Speiser v. Randall* supports the view that the Court will not apply its usual doctrines of standing in cases involving free speech issues.[186]

184. First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 432, 311 P.2d 508, 515–16 (1957). *But cf. id.* at 430–31, 311 P.2d at 514–15.

185. The Court justified its consideration of the assessment and refund procedure as follows:

> The declaration required by § 32 is but a part of the probative process by which the State seeks to determine which taxpayers fall into the proscribed category. Thus the declaration cannot be regarded as having such independent significance that failure to sign it precludes review of the validity of the procedure of which it is a part.

357 U.S. at 522–23. For authority the Court cited Staub v. City of Baxley, 355 U.S. 313 (1958), which held that a person contesting the requirement that he obtain a license before soliciting union members need not have sought such a license before obtaining judicial review of its constitutionality.

186. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Adler v. Board of Education, 342 U.S. 485 (1952);

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On the merits, the Court's decision is understandable only on the theory that preferred constitutional status is given to first amendment rights. For it would be unthinkable for the Court to conclude at this late date that the burden of persuasion cannot constitutionally be placed on the taxpayer in ordinary assessment or refund proceedings. Only by viewing the denial of an exemption as a penal sanction, requiring the safeguards of a criminal proceeding, could this result be reached.[187] While it is true that the economic consequences of a denial of exemption from taxation and the imposition of a tax are identical, it is ironic that the two should be treated alike for purposes of the first amendment guarantee of freedom of speech and yet treated differently for purposes of the first amendment guarantee of freedom of religion.[188]

The *Speiser* case is significant, however, not for the procedural requirement imposed on refund proceedings, but for the doubt it casts on the validity of *any* loyalty affidavit applying to the public at large rather than specific groups which have been subjected traditionally to state regulation. The Court, in a dictum, was careful to distinguish cases in which some important governmental interest had justified inquiries into loyalty despite their incidental effect on freedom of expression.[189]

> Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas.[190]

Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88, 96–98 (1940) (dictum). See 3 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.01–.18 (1958); Note, *The Supreme Court and Standing To Sue*, 34 N.Y.U.L. REV. 141 (1959).

187. The taxpayers, of course, were not subjected to imprisonment nor to infamy or the other collateral disabilities of a criminal conviction. But high standards have been required of tax proceedings deemed to be essentially penal in character. *E.g.*, Lipke v. Lederer, 259 U.S. 557 (1922). And a tax affecting first amendment freedoms may be required to meet an even higher standard. Grosjean v. American Press Co., 297 U.S. 233 (1936). *But cf.* United States v. Kahriger, 345 U.S. 22 (1953).

188. In the *Speiser* case the Court said that denial of a tax exemption could not be justified on the ground that it is a "privilege" or "bounty." 357 U.S. at 518. But compare Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1 (1956), *appeal dismissed for lack of a substantial federal question sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956), in which a tax exemption for a religious school was distinguished from a direct governmental payment. Justices Black and Frankfurter dissented from the Court's action.

189. The cases distinguished were Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

190. 357 U.S. at 527.

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Although the individual's right to silence may be subordinated to the state's interest in insuring a loyal public service or regulating a particular occupational group, the Court has now suggested that it will not be subordinated when the purpose of the loyalty statute is to penalize unlawful advocacy. If the state can impose criminal penalties for unlawful advocacy, it is hard to see why it cannot also impose civil disqualifications (provided, of course, that the state assumes the burden of proof and provides the safeguards of a full criminal trial). The deterrent effect on speech should be less and the choice of sanctions is a matter for legislative judgment. To this the Court has provided no answer. Perhaps the unexpressed premise is that the *Nelson* decision precludes the states from imposing any form of penalty—civil or criminal—on unlawful advocacy of violent overthrow of government.[191] Or perhaps a concern for the conscientious individual who finds it distasteful to pledge his loyalty underlies the Court's blunt warning. One surmises that the difficulties of the Court's narrower procedural holding were necessitated by its unwillingness to come to grips with this more fundamental constitutional question.

Sweezy v. New Hampshire,[192] previously discussed,[193] should also be mentioned in the context of freedom to keep silent, for the opinions in that case are permeated with windy oratory concerning "academic freedom," liberty of "political expression," and "freedom of association." Despite the lack of a majority opinion, six Justices seem to be in agreement that any legislative inquiry concerning words passed within academic precincts is presumptively invalid. These expressions appear to be based on the following logic: exposure of an individual's thoughts or beliefs inhibits free expression, particularly if the ideas involved are unpopular ones; the first amendment was intended to promote free expression; secrecy encourages uninhibited expression; *ergo*, there is a constitutional right to remain silent. But this right, according to what appears to be the majority sentiment, is not absolute; it must be weighed in each case against the governmental interest in disclosure.

These views, if taken seriously, appear (1) to carve out a preferred area within the preferred freedom; (2) to create rights which are based primarily on the harm disclosure causes to the general community, rather than any harm done to the particular individual before the Court; and (3) to make the recognition of these

191. The Court in *Speiser* expressly reserved the question arising under the *Nelson* case. 357 U.S. at 517 n.3. See discussion of this question accompanying notes 39–43, 45a–45d *supra*.

192. 354 U.S. 234 (1957).

193. See part II *supra*.

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societal rights dependent on a failure of the government to show that it has an overriding interest in disclosure. I should like to suggest that the Court may become involved in serious difficulties if it attempts to act on the basis of these grandiose pronouncements.

In the first place, the notion that talk between academicians is of a higher order—and thus entitled to greater constitutional protection—than the conversations of the general citizenry is surely a foolish one. "Academic freedom" has high value as a guild argument of teachers as a profession against their employers and as a symbol of the scholar's ideal—the search for truth. But it has never been thought that the employers of teachers (*i.e.*, the trustees of private institutions and the responsible heads of public institutions) were precluded by the Constitution from inquiring as to what goes on in the classroom or in passing on a teacher's qualifications on the basis of his conduct, writings, beliefs or any other matter thought relevant to fitness.[194]

It is something of an anomaly that the constitutional protection of freedom of speech should prevent disclosure of speech. It is even more of an anomaly that the existence of a constitutional right should turn in large part upon the impact of compelled disclosure on the climate of free expression in the community rather than upon the harm done to the individual before the Court. There is room for legitimate disagreement of opinion in almost every case as to whether disclosure inhibits expression or encourages it. Just as full and honest disclosure in the marketing of securities is thought to strengthen the operations of a free market, so it is argu-

194. Materials relating to "academic freedom," as well as exhaustive citation of the enormous literature, are contained in 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 972–1113 (2d ed. 1958). It has never been thought that the extensive state control over the qualifications of teachers, conditions of employment, grounds for discharge, content of curriculum, and so on, raised any constitutional problems whatsoever absent the most extreme circumstances of arbitrariness or discrimination. The few Supreme Court cases involve statutory requirements prohibiting the teaching of foreign languages in *private* schools (Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927)), or attempting to eliminate private schools entirely by requiring all children to attend public schools (Pierce v. Society of Sisters, 268 U.S. 510 (1925)). Public school teachers have been dismissed because of pacifist beliefs during wartime, McDowell v. Board of Educ., 104 Misc. 564, 172 N.Y. Supp. 590 (1918); State *ex rel.* Schweitzer v. Turner, 19 So. 2d 832 (Fla. 1944); for failure to engage in war work, Reed v. Orleans Parish School Bd., 21 So. 2d 895 (La. App. 1945); for working in a roadhouse after school hours and during the summer, Horosko v. School Dist., 335 Pa. 369, 6 A.2d 866 (1939); for praising Russia and criticizing the United States in the classroom, Board of Educ. v. Jewett, 21 Cal App. 2d 64, 68 P2d. 404 (1937); and for writing a letter, which was publicized, congratulating a former student for failing to register with the draft, Joyce v. Board of Educ., 325 Ill. App. 543, 60 N.E.2d 431 (1945). And there seems to be no question but that the grounds for discharge in private institutions are practically unlimited.

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able that disclosure of campaign contributions, registration of lobbyists and identification of the source of political literature will contribute to free exchange of ideas.[195] Are these matters beyond the realm of legislative judgment? And who can say whether disclosure of a particular matter—favored by some, opposed by others—is an unpopular idea which will inhibit expression or a popular idea which will encourage discussion? Is it not even conceivable that the unpopular idea will stimulate debate? A Court which attempts to assess such imponderables has undertaken a task that it may not be well equipped to handle. The magnitude of the difficulties casts doubt on the logic which creates rights of such evanescent material. And the difficulties in assessing the effects of disclosure on free expression in the community are compounded by the equal difficulties of balancing the result of that equation with the governmental interest advanced by disclosure. Truly this is a task for the gods!

There can be no doubt that privacy is vital to a free society. But this does not justify utilizing the first amendment to do the work of the fourth and fifth.[196] Is it not incongruous that the constitutional provisions relating to privacy—the prohibition of unreasonable searches and seizures and the privilege against self-incrimination—have been whittled away at the behest of governmental "necessity,"[197] while the first amendment has been utilized to pro-

195. The witness in the most insignificant civil trial is not accorded a privilege with respect to his political opinions when they are relevant to the issues of the case. 8 WIGMORE, EVIDENCE § 2214 (3d ed. 1940). Nor can a witness refuse to testify because his disclosures may embarass him or his friends, cost him his job, or expose him to social disapproval. For the laws requiring disclosure of political affiliation, support, and contributions, see Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 204–06, 209–13 (1948). On the general problem of disclosure as a beneficent policy, see WIGGINS, FREEDOM OR SECRECY 119–29 (1956); Wyzanski, *The Open Window and the Open Door*, 35 CALIF. L. REV. 336 (1947).

196. As has previously been noted, the fourth amendment prohibition of unreasonable searches and seizures and the fifth amendment privilege against self-incrimination are not applied with full vigor to the states. But most state constitutions contain similar provisions. The pressure for a first amendment right to silence arises out of two circumstances: (1) use of the privilege against self-incrimination is theoretically limited to situations in which the testimony would incriminate the witness; and (2) a claim of the privilege may have significant collateral consequences since it is often viewed as a confession of guilt. If a first amendment privilege not to reveal matters which the community feels it has a right to know is created, it is likely that the same collateral consequences of social disapproval would become associated with any claim of that privilege.

197. See Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950), for niggardly construction of the fourth amendment. And the Court has now held that a search warrant is unnecessary when the search is for health inspection purposes. Frank v. Maryland, 359 U.S. 360 (1959). The fifth amendment has been held inapplicable to documents of an incorporated or unincorporated association. United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911). And under the guise of a regula-

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tect the unspoken? The promise of the future is that we may live in glass houses — silently!

IV. Conclusions

Although the federal interest in combatting communist subversion is predominant, the states continue to possess concurrent legislative power to protect a variety of state interests felt to be threatened by communist activity. In particular, the loyalty of state employees and of occupational groups in which the states have a special interest, such as lawyers and teachers, is a legitimate matter of state concern. Broader loyalty measures, however, which affect the general public, are of questionable validity.

Pennsylvania v. Nelson,[198] a dramatic instance of the displacement of state law under the Supreme Court's pre-emption doctrine, had a striking effect on state power to punish communist sedition. But the states had been little interested in sedition prosecutions and the decision has not been viewed as foreclosing state power in other respects. While it is still possible that the *Nelson* case may be interpreted so as to limit state power to investigate subversive activity or to impose disqualifications on subversive persons, the due process clause of the fourteenth amendment (and through it the first amendment) is the more significant limitation on state power.

Over the past decade the Supreme Court has been engaged in a gradual refinement and particularization in a loyalty context of the essential elements of due process. The largely procedural limitations on state legislative investigations and loyalty programs which have been evolved reduce somewhat the sweeping natural-law judgment usually implicit in due process determinations and affords some basis for predictability. Although the Court has expanded its role of policing the minimal decencies of civilized government, it is unrealistic to view these largely procedural limitations as seriously curtailing state power. For the most part they merely put important limitations on the permissible ways of using the coercive powers of government. Court enforcement of them may anger state officials who feel they have acted fairly or irritate state court judges whose determinations have been reversed. In the words of the President's Commission on Intergovernmental Relations, "they do not have the effect of transferring activities from one governmental

tory program citizens may be required to keep records which are unprivileged because they are "required." Shapiro v. United States, 335 U.S. 1 (1948); *cf.* United States v. Kahriger, 345 U.S. 22 (1953). Knapp v. Schweitzer, 357 U.S. 371 (1958) and Mills v. Louisiana, 360 U.S. 230 (1959) illustrate the possibilities of forced self-incrimination under the presently prevailing interpretation of the fifth amendment.

198. 350 U.S. 497 (1956).

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level to another. Nor do they prevent either level from pursuing substantive programs of any kind likely to be adopted in this country."[199]

Some of the more important due process principles may be generalized. If a state proves, or the individual admits, present membership in the Communist Party or actual participation in illegal activities, there is little doubt of the state's power to impose civil disqualifications.[200] However, when past membership is involved the state must restrict its disqualification to situations in which the membership was with knowledge of the illegal purposes of the organization.[201] And even knowing membership will not serve as the basis for disqualification if that membership, since terminated, occurred a number of years ago during a period when the Communist Party was a lawful and recognized political party in most of the states.[202] The opposite conclusion, permitting a state to disqualify a person on the basis of such remote activities, is thought to have little or no relevance to present fitness and to involve the dangers of a bill of attainder in that it permanently disqualifies, with no opportunity for rehabilitation.[203]

Thus the teaching of the due process holdings is that the states must provide adequate procedural safeguards if they desire to impose substantial disqualifications on the basis of subversive activity. Notice of charges, a fair hearing, representation by counsel, findings based on substantial evidence (undue reliance on hearsay may be precluded), and a reasoned exposition of the state's interest in imposing the disqualification may well be required. If the state has provided these safeguards and its courts have spelled out the state's interest with clarity, the Supreme Court is likely to respect it. As Allison Dunham has commented, the lesson of the *Konigsberg* and *Beilan* cases is that old slogans and aphorisms cannot serve as a substitute for adequate state procedure, careful consideration of all constitutional claims, and a clear articulation of state policy.[204]

199. THE COMM'N ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 31 (1955).

200. Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

201. Wieman v. Updegraff, 344 U.S. 183 (1952).

202. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Examiners, 353 U.S. 232 (1957).

203. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867). See opinion of Mr. Justice Burton in Garner v. Board of Pub. Works, 341 U.S. 716, 729 (1951) (separate opinion).

204. Dunham, *The Role of the State Supreme Court in the Adjudication of Federal Questions*, 8 U. OF CHI. L. SCH. REC. 140, 142–43 (Spec. Supp. 1958). It should be emphasized that uncertainties with respect to the content and meaning of state law may be settled against the states when first amendment rights are in-

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The recent expansion of first amendment rights, however, constitutes an exception to the general conclusion that the Court has been respectful and accommodating to state policy. It is clear on the one hand that the due process clause prevents a state from discharging a public employee solely because of his claim of the privilege against self-incrimination on a federal proceeding,[205] and on the other that nothing in the Constitution precludes a state from discharging a public employee who refuses to supply information relevant to his fitness to his superiors.[206] But the possible existence of a right to silence in some circumstances throws doubt on further generalization. It seems likely that the following factors will be given consideration: the degree of relevance of the questions asked to present fitness; whether or not the inquiry is made by a state officer and is concerned with the individual's fitness; the nature of the proceeding in which the refusal takes place; the grounds upon which the refusal to cooperate is based; and, finally, the other evidence relating to fitness contained in the record. Other considerations which may influence decision are the degree of severity of the disqualification sought to be imposed, and the extent to which procedural safeguards are provided before the imposition of the disqualification. But the most important consideration, under recent cases, is the impact of the statutory scheme on first amendment rights and the countervailing governmental interest in disclosure.

In employment situations, the Court apparently feels that the governmental interest in loyal employees outweighs the inhibiting effect on freedom of expression and freedom of association.[207] In the more general context of a loyalty program extending to the citizenry at large, it seems likely that the state's interest will be overbalanced by the considerations of free speech.[208] The resolution of intermediate situations remains unpredictable. Despite the absolutist pronouncements of the Court concerning academic freedom, it seems unlikely that the states will be foreclosed from investigating

volved. But the Court's decisions in this respect are not consistent except that a majority refuses to remand the cases to the state courts no matter how uncertain state law is. For example, in the cases discussed in this article state law was unclear in a substantial number. In some the Court gave great deference to a careful exposition of state law by the state courts (*Beilan* and *Lerner*); in others it was willing to construe state statutes on matters not yet passed upon by state courts (*Garner* and *Adler*); and in still others it has rejected interpretations of unclear state law which would sustain constitutionality (*Konigsberg* and *Speiser*).

205. Slochower v. Board of Educ., 350 U.S. 551 (1956).

206. Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958).

207. Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

208. Speiser v. Randall, 357 U.S. 513, 527 (1958) (dictum).

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the loyalty or the classroom statements of professors at state universities.[209] The pulpit tone of many recent opinions, replete with cavalier statements of breathtaking scope, merely encourages controversy and confusion which more precise statement would dispel.

The emerging constitutional principles seem to be (1) that innocent conduct must be distinguished from guilty conduct; (2) that conduct in the past must be considered not as absolutely disqualifying, but with respect to its relevance to present fitness; (3) that imposition of substantial disqualifications is permissible only when there is a substantial governmental interest in doing so and adequate procedural safeguards are provided; (4) that beliefs will be distinguished from conduct; and (5) that conscientious refusals to cooperate will be given an uncertain degree of protection.

These principles are an expansion of prior doctrine and evidence a willingness on the part of the Supreme Court to take a more active role in policing state attempts to impose disqualifications on subversives. Yet the development thus far has not crippled state power. Until recently, the Court avoided resting its decisions on the power of the states to deal with issues of subversion and loyalty. Instead, in addition to interpreting congressional action so as to displace state authority, the Court used the due process clause of the fourteenth amendment to enforce a strict procedural regularity. But free speech considerations have bulked large in many cases, and the Court at present seems more willing to predicate decisions on first amendment grounds. If issues of subversion and loyalty continue to be an important sphere of state concern, a further evolution of constitutional doctrine is likely to occur.

The Court's performance in this difficult area has been marked with a substantial degree of what appears to be confusion and inconsistency. During the early 1950's the Court was inclined to temporize. Finally, during the 1956 Term, it moved swiftly and broadly to reassert individual rights as against governmental action directed at subversion. But the majorities were slim and the members of the Court did not often agree on the choice of doctrine for reaching a particular result. The divisions within the Court and the increasing sophistication of state courts in dealing with loyalty cases have brought more difficult issues to the Court as time has gone by. The resulting patchwork of decisions in 1958 and 1959 gives an impresion of vacillation and retreat which is probably mis-

209. It should be emphasized again that the *Sweezy* case did not involve the power of a state to investigate the curriculum or personnel of a state university. See note 88 *supra*. Investigations of state universities have uniformly been upheld by state and federal courts. See cases cited in 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1108–12 (2d ed. 1958).

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leading. As has been pointed out above, there is a common core of principle on which the Court is agreed. The inconsistency of decisions — to some extent only apparent — is explained largely by two factors: (1) the tendency of some members of the Court to engage in absolutist pronouncements when they are given the opportunity to write for the Court; and (2) a difference of attitude among members of the Court concerning the nature and scope of judicial review and the deference which should be given to other branches of government.

Many members of the Court, of course, have been imbued throughout the recent period with strong feelings of judicial self-restraint and respect for the functioning of state legislatures and state courts. These feelings are bound to become more influential as the states treat issues of subversion and loyalty with greater care. Thus federalist principles continue to be of great force in molding constitutional development. If the observance of these principles often lends an air of unreality (as in *Beilan* and *Lerner*) and formalism (as in *Uphaus*) to some of the Court's opinions, it should be remembered that this may be the inevitable price of vigorous and responsible legislative bodies in this land of democracy.

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